
Audio and Video Links (Live Links) for Northern Ireland Court and Tribunal Hearings

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Introduction

1. The Bar Council is the representative body of the Bar of Northern Ireland which comprises 650 self-employed members who operate on an independent referral basis. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy, serving the administration of justice and upholding the rule of law across this jurisdiction. Northern Ireland's independent referral Bar represents one of the cornerstones of our legal and justice system with an important history of providing expert impartial representation across a range of areas.
2. The Bar of Northern Ireland "the Bar" submitted [a response](#) to the previous consultation on extending the provisions within Schedule 27 of the Coronavirus Act 2020. At that time, we supported the attenuations to the justice system, which were necessary to ensure that justice could be delivered in the circumstances, which prevailed. In that context, the Bar accepted that remote hearings were necessary to ensure that the system of justice in Northern Ireland continued to function.
3. The Bar's previous response noted however, that these live links (we will also refer to them throughout this response as "remote hearings") and other arrangements were introduced as part of an emergency response. There was no time to conduct stakeholder engagement to consult, design, test and implement a system that could ensure that justice was administered during a public health crisis. In this context, it is unsurprising that in various jurisdictions, although the reforms that have been introduced have avoided justice grinding to a standstill, they have not achieved the necessary or optimal levels of suitability or practicability and risk weakening adherence to core principles of justice. Indeed, in several areas it has been reported that the changes introduced across various jurisdictions have been regressive and limiting, jeopardizing access to justice and introducing impediments to the proper conduct of court proceedings. We indicated that there was helpful evidence available from various sources including:
 - a. A Bar of NI internal membership survey throughout May and June 2020 on the operation of remote hearings.
 - b. A Joint Statement from the Bar Council of Northern Ireland; Bar Council of England & Wales; Faculty of Advocates and Bar Council of Ireland.

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- c. Extensive research undertaken by the Nuffield Family Justice Observatory.
- d. An Ulster University survey reviewing the impact of COVID-19 on family courts in Northern Ireland where there had been limited capacity for face-to-face court hearings and a move to remote (telephone or video-enabled) hearings as an alternative.
4. The Bar argues that a detailed evaluation of the current interim environment should, in addition to drawing upon all available evidence, ensure that any further changes are the subject of careful co-design with the judiciary, legal professionals, court staff and others. In that context we welcome the opportunity to respond to the latest Consultation on Live Links for Northern Ireland Court and Tribunal Hearings.
5. Before addressing the specific questions posed, we would like to highlight some elements of context that cannot be ignored when considering the matters raised in the consultation document.
6. In doing so we want to ensure that all relevant concerns and risks associated with Live Links are identified. This is not intended to ignore or deny the potential benefits of Live Links but given the crucial importance of preserving a justice system that delivers outcomes that are both just and sound, it is essential that, before embarking on any changes that might stem from this consultation exercise, all potential risks have been identified and addressed. We want to ensure that we avoid the scenario where, in the words of the Chair of the House of Commons Public Accounts Committee in July 2018 when considering the National Audit Office report on “Early Progress in transforming Courts and Tribunals”, “the operation was successful, but the patient died”.
7. In some cases, these elements build upon some of the research evidence already referenced in the Consultation Document. However, in addition, we have highlighted some additional research and material that does not appear to feature within the Consultation Document but which we hope will add to the comprehensive research already undertaken.

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Factors Affecting Access to Justice When Using Remote Hearings

The Digital Divide

8. We note that Question 1 of the Consultation seeks views on whether the judiciary should continue to decide whether a person's participation remotely in any court proceeding would be in the interests of justice. Question 2 then considers whether there should be any additional elements applied in combination with the above test and Question 3 examines the potential for regulations or rules being used to address any factors or matters a court should have regard to before determining whether the use of live links might meet any agreed statutory test. We address these specific questions within our response.
9. However, consideration must be given to the societal ability to participate in a system based upon digital services. This requires an assessment of whether the skills and infrastructure are in place to enable this to happen. The Office of National Statistics has found that Northern Ireland has the highest proportion of internet non-users in the UK at (14.2%). The full report can be accessed [here](#).
10. The "Digital Divide" refers to the gap between people, households, businesses and areas in both accessing information and communication technologies (ICTs) and using those technologies – that is, opportunity and ability.
11. Critically, there are different components of the digital divide, encompassing a wide range of features, such as broadband and mobile coverage, as well as digital skills needed to engage with technology. The divide is not only a technological problem, but also a social and economic problem as those not connected cannot access services, goods, knowledge and opportunities, which gives rise to inequalities.
12. The World Economic Forum has labelled the digital divide as one of the central global risks facing the world today; they note:

"COVID-19 has accelerated the Fourth Industrial Revolution, expanding the digitalization of human interaction, e-commerce, online education and remote work. These shifts will transform society long after the pandemic and promise huge benefits, but they also risk exacerbating and creating inequalities."
13. We wish therefore to highlight the Research paper prepared by the NI Assembly Research service in 2021 : An overview of the Digital Divide in Northern Ireland - Research Matters (assemblyresearchmatters.org) which examines the scale of the digital divide in Northern Ireland and the inhibitor that this represents in relation to public services which might rely upon the adoption of technology. The research includes the following key findings:

What does the Digital Divide look like in Northern Ireland?

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In respect to the rest of the United Kingdom (UK), Northern Ireland continues to have the [highest proportion of internet non-users](#); standing at 14.2%. The Digital Divide is a serious challenge facing Northern Ireland today. However, not all areas in Northern Ireland are experiencing the divide in the same way.

First, Northern Ireland is sparsely populated, and as such District Councils are experiencing the divide differently. For example, using broadband speed as an indicator, it can be seen that there is great variation amongst the Councils. Unsurprisingly, a relationship between population density and broadband speed can be found, with lower speeds found with those Council areas with a sparser population.:

It seems that assessing the percentage of those who receive a broadband coverage of less than 2 Megabits per second (Mbps) could be a concern under the UK's broadband Universal Service Obligations (USO). This is because individuals now have [the right to request](#) a broadband connection of at least a download speed of 10 Mbps and an upload speed of 1 Mbps. Comparing these [coverage rates](#) to the rest of the UK: Northern Ireland continues to have the lowest coverage of superfast broadband in the UK (90.2%); with England having the highest (97.5%); followed by Wales (96%) and then Scotland (94.8%).

Within the context of Northern Ireland, Fermanagh and Omagh present the highest rates of poor broadband coverage of <2 Mbps, which is below the USO. However, this can be associated with the broader urban-rural Digital Divide. Within the UK as a whole, there is an urban-rural divide; with many [rural areas experiencing poor or even no access](#) to broadband and mobile coverage services. Notably, 5.4% of premises located in a rural setting do not receive the USO broadband connection requirement; compared to 1.2% in urban areas. While 44% of rural areas receive 4G coverage, in comparison to 84% of urban areas across the UK.

One of the most notable factors of this divide is the high number of individuals who are of working age (16-65) and those who have little to no basic digital skills. [Essential digital skills](#) fall into five central categories: managing information, communicating, transacting, problem solving, and creating. These categories encompass everyday activities such as using a search engine, sending an email, ordering shopping online or creating a document such as a CV.

In the UK, 8% of people (4.3 million people) have zero basic digital skills, with a further 12% (6.4 million adults) estimated to have limited digital skills (unable to perform at least one of the basic digital skills). Breaking those figures down by [region](#): 20% of the populations of England and Scotland have no basic digital skills; while in Wales this

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figure stands at 34%. In the case of Northern Ireland, 32% of the working age population (16-65) have limited or no basic digital skills. That is higher than the [UK average of 26%](#). It is inevitable that existing digital skill gap levels throughout the UK population will influence, to a lesser or a greater extent, employment aspirations, social relationships and in turn [the broader economy](#). This is because many work-related activities are moving online and changes to home working patterns require employees to operate technologies remotely. Over the last couple of years, that trend was accelerated by the COVID-19 pandemic, which has required employees to have [basic understandings and an ability to use digital technologies](#).

In Northern Ireland, this seems to be especially acute given that rural areas are home to more than a third of the population; and that the [rural population is growing](#). Rural areas are home to 58% of businesses in Northern Ireland; with 74% of the population being in either full-time or part-time employment. As of 2019, only 4% of the rural population worked from home. However, [this figure is expected to increase](#), following the shift towards remote working following the COVID-19 pandemic.

In Northern Ireland there is a strong crossover with ageing populations, rural areas, and access and ability to use digital services. [Across the UK](#), 80% of those who are offline are aged 50 and above; likewise, 90% of those who cannot perform essential digital skills are over the age of 55. In Northern Ireland, 18% of the rural population are aged 65 and over. Drawing upon the aforementioned statistics surrounding the relationship between age and digital exclusion, rural communities with older populations pose a problem in attempting to tackle the Digital Divide in Northern Ireland, leaving them at further risk to be left behind.

Furthermore, with a [growth in rural populations](#) in Northern Ireland, there could be an increased demand for services such as broadband and mobile network coverage, which could further widen the Digital Divide between urban and rural areas. This is very significant as the Digital Divide gives rise to inequality as those not connected cannot access services, goods, knowledge and opportunities.

14. The [Digital Divide Council](#) has also highlighted socio-economic status as one of the major causes of the digital divide and also a consequence of the digital divide. People using publicly funded legal services are potentially, therefore, more exposed to the negative consequences of the digital divide, unable to access ICT services either due to affordability issues or literacy levels.
15. The Administrative Justice Council 2020 paper: "Digitisation and Accessing Justice in the Community" also highlighted the concern of the digital divide and the risk of frustrating rather than facilitating access to justice through the use of technology:

"In order to ensure access to justice and fairness for those who are, for whatever reason, unable to interact with an online justice system, barriers preventing access to digital assistance must be overcome. Whilst digital technology will, for

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many, be advantageous and make accessing services easier, and over time, many will become more digitally able, there will nonetheless, remain those who are digitally challenged and digitally excluded. The new system must work for all users and reform must not leave behind those unable to access and participate in a digital justice system. As found by the Bach Commission 'Technology has the capacity to enhance, empower and automate, but it also has the potential to exclude vulnerable members of society.'

16. Citizens Advice Scotland (CAS) recently published several opinion pieces in the media. They explained that they are closely monitoring the move to digital services, which has, in their view, both benefits and disadvantages and that they want to make sure everyone has access to justice, no matter their geography, individual circumstances, or area of need. They have said:

"We know that some court and tribunal users feel positively about remote hearings, especially where they have personal circumstances that make attending in person more difficult. Some also feel less pressure and stress from participating in their homes rather than travelling to a court room.

However, we also know that remote hearings can disproportionately disadvantage party litigants (people who represent themselves) or clients who are assisted by Citizens Advice Bureau (CAB) and In-Court advice services.

CAB advisers who support people in legal cases tell us of clients who experienced technological problems which prevented them from joining virtual platforms at short notice. They were unable to alert court staff to this, so the Sheriff assumed they had opted not to participate and went on to grant orders, such as eviction or custody, which impact hugely on people's lives. Advisers also note that body language may be mis-read over a screen, and clients can fail to appreciate the gravity of court proceedings and struggle to understand what is happening during remote hearings. The rising cost of living also raises issues; when people are having to choose between food and heating, the cost of internet access is a barrier to accessing services.

"The use of remote hearings looks set to become the "new normal" so we need to ensure people can access them affordably. Cost is not the only barrier in accessing court services. In our research we also see poor broadband connections, lack of digital literacy, and inaccessibility for those with a disability as barriers to digital participation."

CAS express a view that the solution is to enable channel choice for users.

"Current proposals suggest that a hearing will be largely determined by the type of procedure being used, rather than the needs of the individual. CAS would like to see this turned on its head.

We want everyone to be able to access justice in the way that best suits their needs and facilitates their understanding and involvement, whether that be in person, via

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telephone or video-link. The way a court hearing takes place should be influenced by people's needs as well as the nature of the hearing or action. We don't believe this should be decided just by the courts or sheriff.

Many organisations working on justice issues, including Scottish Government, want to put people at the heart of the justice system. We need them to deliver on that intention. This is what people in Scotland want when accessing justice services; now we need to make it a reality."

- 17.** The survey conducted by the Magistrates' Association for England and Wales on "Magistrates Courts and Covid-19" also highlighted concerns about effective participation, concluding that: "It is essential that lay court users understand what is being said in court hearings and can give their own views. The magistrates we surveyed perceived that the effective participation of defendants was impeded by remote links. They told us that all defendants were affected, but that particular groups suffered more than others. Remote links were seen as unsuitable for defendants who need to play an active part in their hearing. Magistrates observed that neurodivergent defendants find it particularly difficult to follow proceedings and communicate if appearing remotely. Many respondents felt that such vulnerable defendants should never appear on a remote link in a substantive hearing. Other respondents would add those with English as a second language and unrepresented defendants to the list of those who should never appear on video."
- 18.** Given the significance, as highlighted by the examples above, of issues like the Digital Divide we were surprised that it did not feature significantly within the consultation document. We consider that a full Equality Impact Assessment of these proposals contained within the consultation document will be essential.
- 19.** There is a potential tension at the heart of the deployment of Live Links when it comes to open justice. Although, subject to our points above about the Digital Divide, for some a digital based system may enable new opportunities for participation in the justice system, it also creates new risks about the security and integrity of proceedings. Though a remedy may be found to these security concerns, it remains to be seen if this can be done in a way that does not compromise the principle of open justice.
- 20.** We note that at the same time as the Coronavirus Act 2020 came into effect offences were created to protect the Court or Tribunal from illicit recording or transmitting of those proceedings and thus the Coronavirus Act aimed to maintain the operation of the Courts and Tribunals in a manner that complied with the principle of "open justice", while also maintaining the protection of court proceedings from illicit breaching or any contempt of court.
- 21.** Nevertheless, the move to remote hearings has introduced new risks that have a bearing on open justice. There are risks to address such as the privacy of the hearing being compromised if it is audible to others as a result of being broadcast to device in shared locations where other parties will be able to hear the proceedings even if not

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directly in the same room. In addition to the risks of Illicit recording and screen grabs, there are several additional security and identity related risks around the use of live links from the homes of participants. For example, uninvited individuals may gain access to remote hearings or participants may be subject to unseen influence or assistance at their location. This has the potential to distort the integrity of proceedings and lead to unhelpful delays and appeals.

22. The Consultation Document has cited (see paragraph 8.42) a study undertaken with Australian judges of the impact of videolinks. This work, "Remote judging: the impact of video links on the image and role of the judge" International journal of Law in Context, includes the following observation:

"Many interviewees, especially judges, expressed concerns over the extent to which the current configuration of most video links enabled judges to discern whether or not a witness was being influenced by others present at the remote site, given that, unlike the situation in the courtroom, the judge may not have a clear view of the entire remote witness facility. One judge described the court's vulnerability:

'Well that's the other thing, you don't know who else is in the room....For example there might be an order for witnesses out of Court. You might have three lay witnesses giving remote evidence.

Now how do you know that the other lay witnesses are not present ... listening to the cross-examination? ... you're relying on the other end complying ... ensuring that people are out of ear shot of the other evidence being given, so that can be a problem as well.'

"

Compatibility with Problem Solving Courts

23. The Australian study raised some additional points relating to whether live links might be compatible with the nature of proceedings that take place in problem solving courts. In her address at the Opening of the Legal Year on 5th September, the Lady Chief Justice cited taking problem-solving initiatives forward as a key priority and referred to how,

"The judiciary witness, on a daily basis, some of the challenges facing young people who come before the criminal courts." The Lady Chief Justice described the clear benefits that can be derived from deploying problem-solving courts" and how, "These initiatives require the engagement and support of others working in the field of health and social services and they cannot be successful without a shared commitment."

24. In this context the observations made as part of the Australian study are of interest. They observed that:

"Effective judicial engagement is also a hallmark of the therapeutic and problem-solving approaches to justice implemented in some criminal courts over recent decades, largely in the sentencing phase, to address offender behaviour related to issues such as illicit

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drug use, mental health problems and homelessness (King et al., 2014). They require a more relational approach to judicial work, where judges make greater use of their personal and interactional skills.” (Roach Anleu and Mack, 2017; Wallace et al., 2012) to secure more effective sentencing outcomes.

“It has been observed elsewhere that it is somewhat paradoxical that the increased use of video links, associated as they are with more distant or impersonal communication, has occurred at time has also been a strong move towards more engaged styles of judging (Wallace et al., 2017).

“The trend towards therapeutic styles of judging has also resulted in a change in the nature of judicial work, to the extent that judges working in problem-solving courts typically view themselves as working as part of a team, which draws on the skills of other professionals, each managing the specific aspects of an individual’s programme (King et al., 2014). This suggests that the image of the judge may be one that is continuing to evolve and the challenge for courts in the future will be to ensure that, in whatever form it is conveyed, the image is congruent with the nature of the role and its responsibilities .In its most positive light, the use of video links might prompt new discussions about what the image of the judge should be.”

The Gillen Review

25. The Gillen Review of Sexual Offence cases included recommendations that should be considered to determine their applicability and compatibility with the application of remote hearings.
26. In Chapter 3: Restricting access of the public, the Gillen Review recommended: “That the public at large be excluded in all serious sexual offence hearings in the Crown Court save for officers of the court, persons directly concerned in the proceedings, bona fide representatives of the press, a parent, relative or friend of the complainant or, a parent or relative of the accused together with such other persons (if any) as the judge, or the court, as the case may be, may in their or its discretion permit to remain. The public will be admitted for the verdict and sentencing in the event of conviction.”
27. It also recommended that: “Cipher be applied to the complainant’s identity in all court hearings, including the initial charge sheet and the bill of indictment (albeit the identity must be revealed to the accused and their representatives) and their image shall not be publicly displayed during any hearing save to the accused and their representatives.”
28. The ability to apply these recommendations in the context of Live Links will require fresh consideration and may potentially create fresh challenges to contend with.

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Media Reporting

29. A Research paper published in June 2022 by Tom Smith, Sally Reardon, Marcus Keppel-Palmer, Bernhard Gross from the University of the West of England, Bristol. ‘An endlessly strange experience’: Experiences of media reporting on criminal courts during the Covid-19 pandemic (worktribe.com) examined whether restrictions caused by Live Links during the pandemic had adversely affected media reporting and its role in supporting open justice. The research studied the work of media reporters covering criminal courts during the initial stages of the Covid-19 pandemic in Spring 2020, considering the way in which courts and information on hearings were accessed; the routines of court reporters; and their perceptions of the maintenance of the principle of open justice in this context.
30. The report explores this by detailing the self-reported experiences and insights of reporters, obtained through interviews. Whilst most reporters believed that virtual courts afforded greater opportunities to access a greater range of hearings, the loss of face-to-face contact meant that traditional approaches to newsgathering in criminal courts – such as the ability to follow up on matters arising in hearings and the maintenance of key relationships – were challenged. This arguably had negative implications for the quality and depth of reporting on criminal cases.

Data Protection

31. [In its paper the CCBE](#) described a further array of fresh data security concerns created by the adoption of technology in both consultations and hearings, making the point that:

“The COVID-19 pandemic has forced rapid changes in the way in which we all work, and lawyers are not exempt from these changes. The practice of law has always depended on the need to engage directly with others: lawyers with their clients, with their opponents, their negotiating counterparts, witnesses and the court, yet the way in which those encounters have taken place have, through necessity, changed.... The result has been a constantly moving, changing and unfamiliar landscape, with sudden new challenges coming out of nowhere, and the need to develop rapid and novel responses. This challenge must be seen as a great opportunity that can drive forward the digitization of our society and our judicial systems.

“Yet, despite this constant state of flux, certain values remain unchangeable – the respect for professional secrecy and legal professional privilege, compliance with data protection and deontological obligations and the over-arching requirement to provide a fair trial.”

“The various platforms provide different standards of reliability, robustness, user experience and the like, and there may be a natural tendency to choose the one which gives, subjectively, the best experience and the most useful features. That is largely a

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matter of taste, but, in the final analysis, choosing an appropriate tool depends not only on such factors but also on a careful consideration of the great unseens – GDPR compliance, protection of confidentiality, robustness of the terms and conditions from the point of view of the user. Further, as the above discussion discloses, this is a review exercise which cannot be carried out only once but needs to be performed constantly”

Factors Affecting Suitability of Remote Hearings from Perspective of Practitioners and Judges

Suitability of Remote Hearings for Interest of Justice

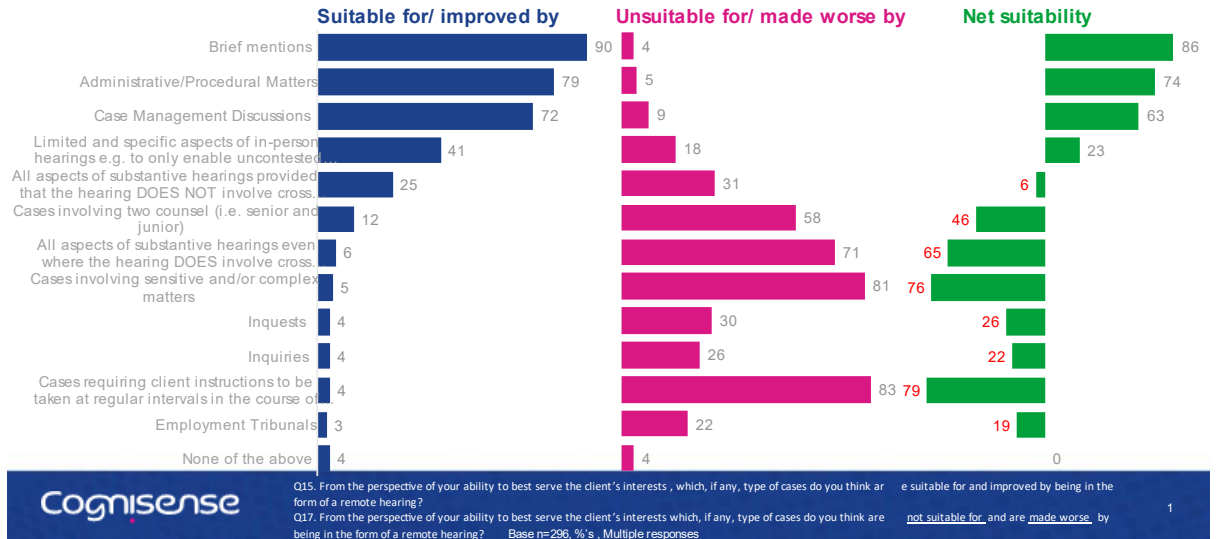
- 32.** In the early months of 2022, the Bar Council of Northern Ireland, using the services of an external and independent research partner, conducted a comprehensive survey of the profession. Included in the survey were questions relating to the suitability of remote hearings for various types of hearings. The survey findings reflect the views of 296 barristers, representing a cross section of the Bar. The findings (see tables below) show where remote hearings were considered suitable and when they ceased to be considered suitable or beneficial. The advantages and disadvantages were also analysed.

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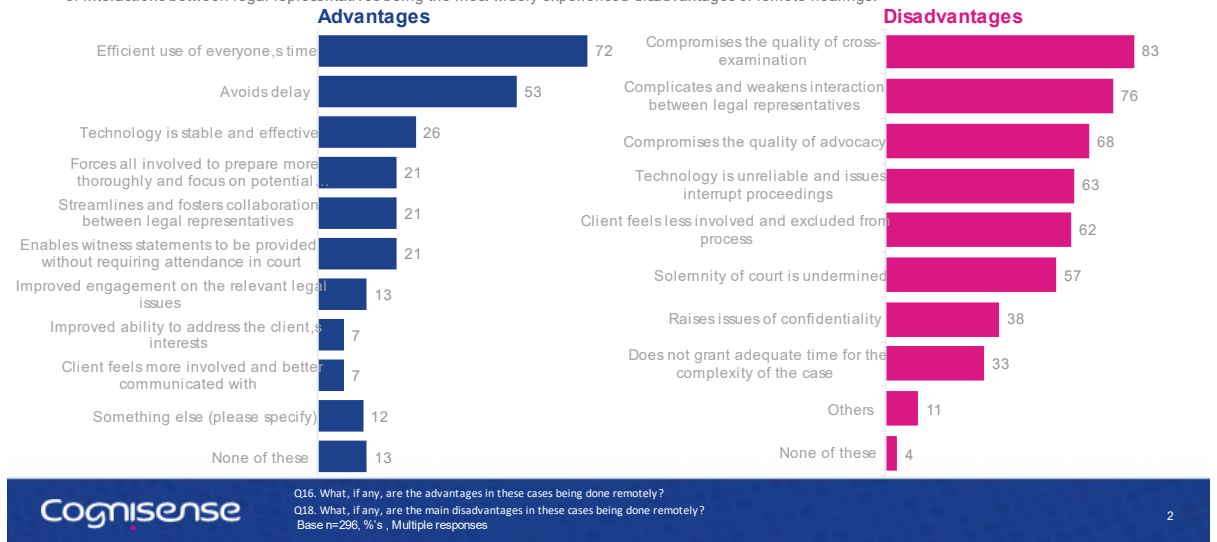
Suitability of remote hearings for cases

On balance four types of cases are regarded as suited to remote hearings with overwhelming support that brief mentions, administrative matters and case management discussions are suited to these circumstances. At the other end of the spectrum the vast majority of opinions are that cases requiring client instruction at regular intervals, those involving sensitive/ complex matters and substantive hearings involving cross examination are not suited to remote hearings.



Advantages/ Disadvantages of remote hearings for cases

Supporting remote hearings are arguments on the efficient use of time and avoidance of delays. There is a much more supported range of disadvantages of which six potential disadvantages are supported by more than half of the Bar membership. The impact on the quality of interactions between legal representatives being the most widely experienced disadvantages of remote hearings.



33. On 27th April 2022, the House of Commons Justice Select Committee released a report on "Court Capacity" (report linked [here](#)). In common with other reports this identified potential benefits from the application of technology to courts. Their report also made

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some very clear recommendations about what should govern the decision as to whether to deploy Live Links. For example:

- *The Committee recognises the advantages for advocates to attend remotely; however, it is important to recognise that in Crown Court cases dealing with the most serious cases, it will often be in the interests of justice for advocates to attend in person. (Paragraph 66)*
- *We are concerned that the current approach to remote hearings in the Family Court is having a negative effect both on court capacity but also on the quality of the justice itself. Whilst we note that a significant proportion of users are said to prefer remote hearings, the interest of justice should be placed above what is most convenient to users of the court. (Paragraph 104)*

- 34.** In an interview following her retirement from her position as President of the Irish High Court in 2022, Ms Justice Irvine said dealing with the Covid pandemic situation “took up an awful lot of time and energy”, with “endless meetings” to make sure court time was maximised without putting people at unnecessary risk. Ms Justice Irvine stated it was important to say that some good has come out of the pandemic as it has forced the judiciary and the Courts Service to look at new ways of administering justice. Referring to the advent of online hearings, she said: “It showed us that not absolutely everything has to be done in a physical courtroom with everybody travelling to one destination. A fair amount of straightforward work can be done through remote hearings and hybrid hearings. However, experience has taught us the more contentious cases and the more complex cases are much better done in a physical setting.”
- 35.** In Scotland, recent changes to guidance from the Scottish Courts and Tribunal Service (SCTS) have decided that while most procedural hearings will largely take place via WebEx - or, if directed by the court, by written submissions - substantive hearings will return to courtrooms. a return to in person hearings for civil litigation too.
- 36.** The Consultation Document has already demonstrated an awareness of the work done by Fair Trials International. In 2020, it published a survey of 90 or so responses by practitioners, largely defence lawyers, to developments in England and Wales – Justice Under Lockdown. This survey has been reported on in various sources, including : Remote Courts and Fair Trials | Law, Technology and Access to Justice (law-tech-a2j.org) which highlighted that the view from practitioner respondents were that:
- 44% of respondents believe that remote hearings make it significantly more difficult for defendants to participate in the proceedings (with a further 19% saying that the impact on effective participation had been moderately negative)

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- 67% of respondents thought that the remote hearings had a significant negative impact on the ability of defendants and their lawyers to communicate before and during hearings. A further 25% thought that there had been at least some or moderate negative impact; and
- 75% of respondents believed that remote hearings had made it harder for defendants and their lawyers to obtain, present, and challenge evidence; and
- 60% of respondents expressed that the use of video-link or telephone had a noticeably negative impact on the overall fairness of the hearings.

- 37.** The survey conducted by Magistrates’ Association for England and Wales on “Magistrates Courts and Covid-19” raised some doubts as to whether judicial discretion is understood and freely applied when making the decision as to which format to hearing to adopt:

“The judiciary can, theoretically, decide at listing and/or at any other stage whether it is in the interests of justice for any party, or for any professional, involved in a hearing to appear remotely. Despite guidance issued by the Chief Magistrate and the Justices’ Clerks’ Society that all decisions on the use of remote links should be subject to judicial discretion, most magistrates either did not know they had that discretion or did not feel able or inclined to exercise it in this emergency. Magistrates were not explicitly reminded by their senior judges or by court staff that they had this discretion. Many magistrates were, however, confident in halting proceedings when they considered remote links were seriously hampering effective justice. On a daily basis, magistrates have few means of influencing, in advance of a hearing, whether parties appear on remote links. During the pandemic, the majority of magistrates accepted that the emergency necessitated the use of video and phone connections to prevent people from having to travel to court. In future, magistrates must be consulted on policies for use of remote links and must liaise with court staff to ensure that the use of remote links is always in the public interest.”

- 38.** In his address in October 2021 Speech by the President of the Family Division: “Interesting Times” | Courts and Tribunals Judiciary, Sir Andrew McFarlane highlighted his views on remote hearings within family cases, including a clear view the decision as to the format for each hearing should be taken by the judge in charge of the case but also indicating the drawbacks that can apply to remote hearings in family cases:

- “The experience of the past 18 months has shown that judges and magistrates can and should be trusted to exercise their discretion on a case-by-case basis, within broad parameters, rather than being subject to unnecessarily restrictive and clunky national guidance.

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- It follows that, moving forward, it is not my intention to issue any formal Practice Direction or Presidential Guidance (with a capital 'D' or 'G') setting out firm categories of case that should, or should not, continue to be heard remotely.
- The primary reason for not doing so is that I continue to believe that the decision as to the format for each hearing should be taken by the judge in charge of the case, unfettered by any prescriptive diktat from on high. From the start of the pandemic I have trusted the judiciary to exercise discretion in these matters. I consider that my trust has been well placed and there is no reason to change that approach now.
- Supported by enhanced IT, the courts have now become used to remote working and, for an appropriate hearing, and there will be many, this should now be the format of choice.
- The central theme running through the approach that should apply is that the parties and their lawyers should normally be physically present at court on those occasions when an important decision may be taken.
- There are a number of positives about remote hearings, but one clear negative is the absence of that time outside court, in the 45 minutes or so before a hearing, when the presence of 'the court door' and the proximity of the other parties and their lawyers will not infrequently lead to a focussing of issues or even settlement. That time and space simply does not exist before a remote hearing and it is important that this valuable opportunity for advice, negotiation and possible settlement is regained.
- Further, it is clear that, at least some lay parties afford less respect to the court process, and the outcome of it in terms of any order, when the hearing is online or by phone. The use of remote attendance is not necessarily more efficient and quicker and it is possible to process more cases at court than it is to do so remotely.
- More generally, the obvious benefits of an attended, in court, process before a judge or magistrate makes an important decision in a family case do not need to be stated. Remote platforms are good for undertaking transactional communications, but there is more to a Family Court hearing than simply transacting business. Much that goes on has a 'human' perspective, which can often be lost online, but is fully present in a court room.
- We need to continue to embrace the technology and to use it, for the right hearings, to the full. There are clear detriments to attended hearings in terms of travel time
- A balance has to be struck in each case, but generally that balance should come down in favour of the parties and their lawyers attending all hearings where an important decision in the case may be taken."

Well-being and Morale

39. Sir Andrew McFarlane also addressed the impact of remote hearings upon the wellbeing of the practitioners, commenting: "My concern for the well-being of all those who work in the Family Court or the CoP remains very high. The system is currently running 'hot'

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and at a level above its normal capacity. The volume of work that is being undertaken is well above pre-Covid levels. The number of judicial sitting days is up by about 25%. The rate at which cases are concluded is, however, down. The backlog of work in the system remains stubbornly high and, in terms of private law, is increasing. Despite the increase in judicial time, the scale of the backlog is such that delay is inevitable. Everyone, be they court staff, social workers, CAFCASS or CAFCASS Cymru officers, solicitors, barristers, magistrates or judges, is working even harder than they were when the topic of 'well being' first became prominent. Remote working allows people to take on more work. The pockets of the day that were taken up with travel, waiting outside court, communal coffee breaks or walking out to buy lunch can now be filled with on-screen work – and they are being filled in that way. We all have less 'down-time' and more 'up-time' to a significant degree."

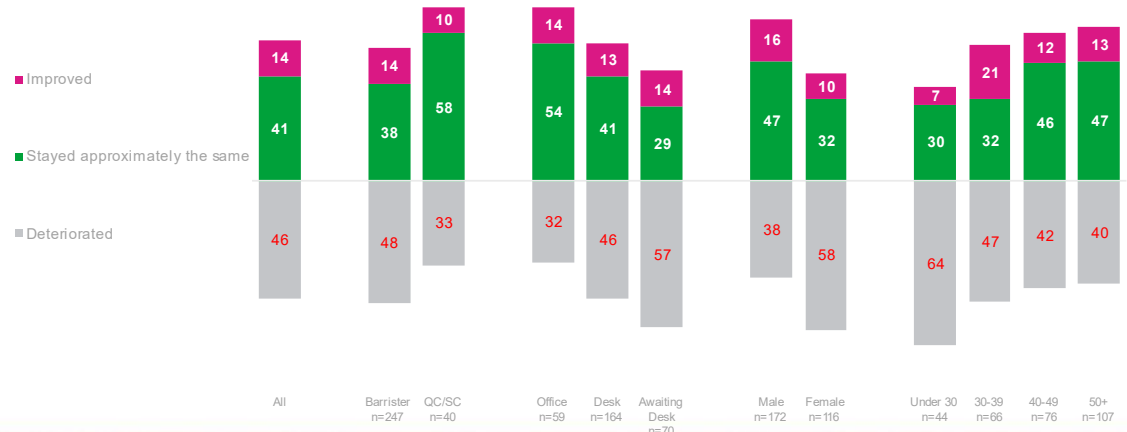
- 40.** In the words of the survey conducted by the Magistrates' Association for England and Wales on "Magistrates Courts and Covid-19", "Magistrates' morale has suffered during the pandemic, partly because of the changes in the nature of court hearings. The majority of respondents felt remote links negatively affected their morale, satisfaction in their role and experience of the court process. Magistrates described remoteness not just from the normal court procedure, but also from their communities when conducting hearings using remote links. They were dissatisfied with the support they received, additional training (or lack of) and the use of remote links for convenience rather than need. They perceived that remote links led to a poorer form of justice. Collectively, these factors led some magistrates to consider resigning."
- 41.** The Bar Council of Northern Ireland's Membership Survey has also examined trends in practitioner wellbeing over the period when remote hearings have been deployed. This shows that almost half of barristers have seen a deterioration in their wellbeing over the past 3 years.

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State of wellbeing compared to 3 years ago

Almost half of the Bar membership have seen a deterioration in their wellbeing, where 1 in 7 have seen an improvement in wellbeing relative to 3 years ago. QCs, males and older practitioners appear to have been least susceptible to a deterioration in their circumstances.



Cognisense

Q27. Which of the following statements best describes how you feel about your overall wellbeing as a result of your working environment?
Base All except exempt members n=293, %'s

42. It is also worth noting that in person hearings provide learning opportunities for young barristers. The experience of the court setting is difficult to replicate through the online experience. The legal system requires a cohort of highly skilled oral advocates to enable access to justice and provide the best possible representation for clients. While practitioners have adapted to online hearings, the ability to deliver coherent, well-structured and concise in person submissions is a key skill for a barrister, and one that must be honed through practice.

It's essential that the young bar, as the senior counsel and judiciary of the future, have early professional development around in person hearings and the opportunity to experience the court room setting as early and often as possible.

43. In September 2021, the Bar Council of England & Wales' report on the Barristers' Working Lives 2021 survey was published and it contains some helpful information on remote hearings (report linked here).

44. The findings included: The majority of barristers (86%) had attended court in the three months before the survey, but only half (51%) had attended in person (35% had attended court remotely but not in person).

Of those who had attended in person, around three quarters had experienced problems in the court system, compared with just over half of those that had attended remotely only.

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- Technical problems with video platforms were the most experienced problem, among those attending in person as well as remotely, followed by backlogs of cases.
- Barristers who reported that the pandemic had a negative impact overall on their working lives gave significantly lower scores to the wellbeing factors. This suggests that a negative impact of the pandemic on barristers has fed through to their views on their working lives, but alternatively it may be the case that barristers who were least supported by colleagues and had less control of their workload were more likely to experience negative impacts of the pandemic.
- Barristers who experienced financial hardship were also much more negative about wellbeing factors.

Factors Related to Government Ability to Deliver Required Resources

45. This consultation is taking place at a time when there is no sitting NI Executive, Assembly or Justice Committee. However, the policy and legislative conclusions that may be arrived at through this consultation will require sustained investment and prioritisation from government if they are to be able to be relied upon. The significance of securing clear and lasting commitment from government can be seen in a series of examples from England & Wales.
46. On 27th April 2022, the House of Commons Justice Select Committee released a report on “Court Capacity” (report linked here). In common with other reports this identified potential benefits from the application of technology to courts. It observed that “The recovery from the pandemic provides an opportunity to build a sustainable long-term approach to growing the capacity of the courts over the next decade “
47. However, they also express the need to ensure there is a full and clear analysis of the capacity constraints affecting court business and express a warning of the need for this to be fully measured and invested in: “In relation to every element of court capacity, including the estate, data, technology, staff and the judiciary, the Government needs to show the long-term ambition required to ensure that the number of outstanding cases will be kept under control and delays will be reduced. Without it there is a risk that in the future the courts will be too fragile to cope with any unexpected surges in demand. The pandemic has shown that it is both expensive and difficult to expand court capacity in the short-term and therefore, future governments should learn the lesson that reductions in capacity may lead to more costs further down the line. Diverting cases away from the courts is part of the answer, but a more wide-ranging package of measures is needed to address the capacity problem.”
48. In March 2021, the House of Lords Constitution Committee published a report called “Covid-19 and the Courts”. This makes several recommendations to the Government, including for continued investment in remote hearing technology (report linked here).

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- The impact of virtual hearings across the justice system remains fundamentally unclear in a number of respects, as insufficient data is being collected and analysed by Her Majesty's Courts and Tribunals Service (HMCTS).
 - The sudden shift to remote hearings has stretched limited court resources, created new barriers to communication between lawyers and their clients, and risks excluding court users. Limited IT access, home distractions, and the more tiring nature of remote hearings all threaten to undermine effective participation. To ensure access to justice is sustained during virtual hearings, we recommend that the Government ensures clear guidance on their use is made available to all court users, judges and court staff. This will aid preparation, enhance public perceptions of fairness and help to secure procedural justice.
- 49.** The pandemic has shown that remote court access has the potential to enhance access to justice, but there is a significant difference in the experiences of professional and lay court users. Operational changes introduced in response to the pandemic should not be regarded as irreversible where they have risked undermining access to justice, open justice or consistency in the application of the law. We recommend that the Government continues to invest in and develop the technology for remote hearings and the guidance to support it, learning the lessons from its use during the pandemic. There should be an ongoing process of engaging with researchers and the legal sector to ensure that access to justice is secured via remote hearings.
- 50.** In 2016, HM Courts & Tribunals Service (HMCTS) set up a portfolio of change programmes that will introduce new technology and working practices to modernise and upgrade the justice system. HMCTS's reform programme was driven by the need to address complex and inefficient case management systems, and to achieve substantial efficiency savings. The programme covers crime, civil, family and tribunals and several cross-cutting projects.
- 51.** HMCTS is now in the final phase of the programme, which it expects to complete in 2023, three years later than originally planned. Due to the COVID-19 pandemic, HMCTS has had to deal with a rapidly changing operational environment. The impact of the pandemic has also placed increased importance on the programme's successful completion as an essential part of the Ministry of Justice's commitment to reduce the backlog in courts.
- 52.** The National Audit Office has been monitoring the progress of HMCTS in meeting its plans The Court Reform Programme - progress review - National Audit Office (NAO) work in progress. In 2018 the NAO published a report called Early progress in transforming courts and tribunals. This gave several grounds for concern and contained the following findings:

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- Delays in introducing primary legislation create a significant degree of uncertainty. The 2017 general election changed the planned legislative timetable, and the timing of the Courts Bill is currently unclear. Some elements of reform, such as the planned extension of virtual hearings, will depend on primary legislation. Without this, HMCTS may have to re-scope elements of the portfolio which is likely to cause delays, increase costs and reduce benefits. It could potentially signal a lack of commitment to the changes which could weaken support and also increase the dependence on the judiciary as certain changes will need to be enacted through Procedure Rules Committees. HMCTS may need to re-prioritise its ambition should this risk or others materialise. In doing this it will need to be clear about which elements of reform it considers essential to achieving its vision (paragraphs 1.25 and 1.26).
 - HMCTS has changed the timescale and scope of the portfolio significantly since 2016. Recognising the breadth and ambition of its original plans, HMCTS extended the timetable from four to six years in 2016, though it did not change the budget.
 - Delivering the reforms successfully remains extremely challenging, despite HMCTS's work to reduce risk. The revised six-year timescale for the reforms is still shorter than the time taken to complete smaller programmes in other countries. The Infrastructure and Projects Authority's most recent assurance review concluded that successful delivery of the programme was in doubt, and that there were major risks or issues in a number of key areas. It noted, however, that those leading the programme were aware of these issues and were taking action to resolve them (paragraphs 1.19 and 3.2).
 - HMCTS has made less progress overall than it had expected to at this stage. HMCTS completed the first of four 'interim states' at the end of September 2017, including rolling out early versions of several technical components such as online applications for divorce. At this point, it reported that it had fully completed 62% of planned outcomes and partially completed 25%, with 11% significantly incomplete and the remaining 2% adversely affecting the delivery of the next state. The estates reform project has generated more income than expected. The programme at greatest risk of not achieving its outcome is the Common Platform Programme. It has suffered significant delays in development and delivery.
 - Expected costs have increased and planned benefits have decreased. Since 2015, HMCTS has revised its business cases for the Reform Programme and the Common Platform Programme twice. The 10-year economic case has weakened in each successive iteration. This is in part due to the longer timescale for rolling out the programmes. Annual 'steady-state' benefits have also fallen as HMCTS has reduced the scope of the portfolio. The business cases only quantify benefits in terms of savings to HMCTS and the Crown Prosecution Service. It currently excludes estimates of wider benefits to other organisations and court users (paragraphs 1.15, 1.16, 2.13 and Figure 9).
- 53.** There are gaps in the funding for reforms in later years. HMCT'S plans to pay for changes using funding from HM Treasury (£810 million) and retained savings and receipts from property sales (£282 million). The business case projects a funding shortfall of £61 million, assuming that HM Treasury will agree that all previous years' underspends can

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be carried forward. Without this agreement, the funding gap could be £177 million. Underspends have arisen because of delays to projects or the two-year extension in the timetable (paragraphs 1.14, 2.10, 2.14 and Figure 10)

The NAO report was endorsed by the Commons Public Accounts Committee in July 2018. Meg Hillier MP, who chaired the committee, said:

“Government has cut corners in its rush to push through these reforms. The timetable was unrealistic, consultation has been inadequate and, even now, HMCTS has not clearly explained what the changes will mean in practice. Our report recommends action to address these failings. But even if this programme, or a version of it, gets back on track I have serious concerns about its unforeseen consequences for taxpayers, service users and justice more widely.

“There is an old line in the medical profession — “the operation was successful, but the patient died”. It is difficult to see how these reforms could be called a success if the result is to undermine people’s access to justice and to pile further pressure on the police and other critical public services. Government must engage properly with these challenges and explain how it will shepherd this programme through the upheaval taking place across the justice system.”

In its subsequent 2019 update the NAO concluded that:

- HMCTS is now around halfway through its reform programme. But, in common with many government transformation programmes, it is behind where it expected to be and has had to scale back its ambitions. While HMCTS has kept within budget, this has come at the cost of a reduced scope and lower savings. HMCTS has improved transparency and made good progress in transforming some services, but there are still significant challenges ahead. The timescale and scope remain ambitious and HMCTS will need to manage the tension in delivering reformed services at pace while not risking damage to existing and future services. If HMCTS is to deliver reform, and improve service quality for court users, it will need to be disciplined in keeping every element of its portfolio under control.
- HMCTS has largely managed to remain on track in its plans to reduce the size of its estate so far but any future reductions will be far more challenging. Indicative plans to close around 80 more courts from 2020 depend on successfully delivering other reform projects to shift hearings out of the courtroom or improve the efficiency of courts and tribunals. Given the delays to date, there is a risk that not all these closures will go ahead, further reducing potential savings.

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Conclusion

54. The Bar is providing these comments and sources of evidence to provide the important context and background for the consultation response which follows.
55. We appreciate that the consultation is concerning itself with the legislative provision that might enable the use of Live Links and is not addressing the operational detail of the use of the technology. However, such significant legislative change can never properly be considered in the abstract or in a factual void and, accordingly we feel that the evidence above is pertinent to the questions posed in the consultation on topics such as judicial discretion; the interest of justice; open justice and the factors a court should have regard to when determining the use of live links.
56. We would therefore ask the Department to examine and consider, not merely our direct answers to the specific consultation questions, but also the evidence provided and the lived experience of our courtroom advocates who direct and active participants in all of the hearings are currently under consideration.
57. We remain eager to work with the Department further in its consideration of these matters.

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Consultation Questions:

Our answer in each case is shown by the highlighted option

Question No 1:

The Department seeks your views on the proposal the judiciary should continue to decide whether a person's participation remotely in any court proceedings would be in the interests of justice.

Which of the following best describes what you think about this?

I agree.

I do not agree.

I am unsure.

I have no view.

Please insert any additional comments/observations you wish to make.

Please refer to our background comments provided in paragraphs 1-55 above.

Question No 2:

The Department seeks your views on whether the statutory test for participating remotely should include that the court must be satisfied the use of live links is in the interests of justice AND not prejudicial or contrary to the fairness of the proceedings.

Which of the following statements below best describes what you think about this?

I do not consider the statutory test should include this additional requirement

I consider the statutory test should include this additional requirement that the use of live links should not be prejudicial to the fairness of the proceedings.

I am unsure.

I have no view.

Please insert any additional comments/observations you wish to make.

Please refer to our background comments provided in paragraphs 1-55 above.

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Question No 3:

The Department is minded not to immediately legislate to specify factors or matters a court should have regard to or take account of in determining the use of live links in a specific case.

Instead, the Department would include within legislation, a power for the Department, to make secondary legislation such as rules or regulations that could specify factors or matters a court should have regard to or take account of in determining the use of live links. Court rules or regulations have the advantage of being quicker to update than primary legislation.

Which of the following statements below best describes what you think about the Department's proposal to include in any legislation a power to make court rules or regulations to address any factors or matters a court should have regard to before determining whether the use of live links meets a statutory test like 'the interests of justice' or any alternative?

I consider the Department should rely on a power to make court rules or regulations to address, at some future date, specific factors or matters a court should have regard to in determining the use of live links.

I consider the Department should not rely on a power to make court rules or regulations to address specific factors or matters a court should have regard to in determining the use of live links but should include these factors in an Act of the Northern Ireland Assembly.

I am unsure.

I have no view.

Please insert any additional comments/observations you wish to make.

Please refer to our background comments provided in paragraphs 1-55 above.

Question No 4:

The final question in this chapter concerns whether legislation includes, as occurred in Scotland, England and Wales, an obligation that a court or tribunal should have regard to any guidance issued by the Lady Chief Justice.

Which of the following best describes what you think about this?

I agree legislation should include an obligation a court or tribunal have regard to relevant guidance issued by Lady Chief Justice

I do not agree legislation should include an obligation a court or tribunal have regard to relevant guidance issued by the Lady Chief Justice.

I am unsure.

I have no view.

Please insert any additional comments/observations you wish to make.

Please refer to our background comments provided in paragraphs 1-55 above.

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Question No 5:

The Department is not convinced there is evidence that allowing jury members to participate remotely in a trial is appropriate for Northern Ireland at this time. The Department considered the outworking of the mock jury pilot project operated in England and the evaluation of that pilot. The Department's view is that any such change more appropriately lies within a wider review of jury arrangements in Northern Ireland. The Department, therefore, proposes that all members of juries should continue to be required to attend court in person.

Which of the following best describes what you think about this?

I agree.

I do not agree.

I am unsure.

I have no view.

Please insert any additional comments/observations you wish to make.

Please refer to our background comments provided in paragraphs 1-55 above.

Question No 6:

The Department, having reviewed the various legislative provisions recently passed for England and Wales as well as the Republic of Ireland, considers there should be no presumption of exclusion from the use of live links for an appeal hearing.

Which of the following best describes what you think about this?

I agree that appeal courts should use live links for hearings provided the statutory test is satisfied.

I do not agree that appeal courts should use live links for hearings provided the statutory test is satisfied.

I am unsure

I have no view

Please insert any additional comments/observations you wish to make.

Please refer to our background comments provided in paragraphs 1-55 above.

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Question No 7:

The Department considers that all courts, including appeal courts can be an appropriate forum for the court to determine complex matters of law, via live links, subject to judicial discretion.

Which of the following best describes what you think about this?

I agree that hearings using live links are capable of dealing with complex matters of law subject to judicial discretion.

I do not agree that hearings using live links are capable of dealing with complex matters of law subject to judicial discretion.

I am unsure.

I have no view.

Please insert any additional comments/observations you wish to make.

Please refer to our background comments provided in paragraphs 1-55 above.

Question No 8:

The Department considers there will always be cases for which remote evidence may be less desirable either “in the interests of justice” or to ensure “fairness” to the parties before the court or tribunal. The Department’s firm view is the judicial member is best placed to determine, on a case-by-case basis, what should occur having being required to hear the views of the parties.

However, the introduction of a default statutory presumption to rule out a virtual hearing for oral evidence during a final or contested hearing (whether criminal, civil including public or private law or within the remit of a statutory tribunal) might address the reservations expressed to date about live links.

Which of the following best describes what you think about this?

I agree there should be a default statutory presumption to exclude the use of live links for final hearings where contested oral evidence is required.

I do not agree there should be a default statutory presumption to exclude the use of live links for final hearings where contested oral evidence is required.

I am unsure.

I have no view.

Please insert any additional comments/observations you wish to make.

Please refer to our background comments provided in paragraphs 1-55 above.

Question No 9:

The Department considers any default statutory presumption, if introduced, to protect the principle of judicial independence, must be capable of being deviated from when the judge is satisfied the statutory test is met.

Which of the following best describes what you think about this?

I agree the judge hearing the case, if satisfied the statutory test/s is met, can deviate from any default statutory presumption.

I do not agree the judge hearing the case, if satisfied the statutory test/s is met, can deviate from any default statutory presumption.

I am unsure.

I have no view.

Please insert any additional comments/observations you wish to make.

Please refer to our background comments provided in paragraphs 1-55 above.

Question No 10:

The Department does not wish to see any diminution of video link procedures in place, before the pandemic, which allows young and vulnerable witnesses to provide their “best evidence”. Accordingly it is proposed provision be made to prevent any default statutory presumption excluding the use of live links for final hearings from impacting upon legislative provisions in force before the Coronavirus Act 2020.

Which of the following best describes what you think about this?

I agree pre-existing legislative provisions permitting the use of remote evidence before the Coronavirus Act 2020 should fall outside the impact of any default statutory presumption to exclude the use of live links for final hearings.

I do not agree pre-existing legislative provisions permitting the use of remote evidence before the Coronavirus Act 2020 should fall outside the impact of any default statutory presumption to exclude the use of live links for final hearings.

I am unsure.

I have no view.

Please insert any additional comments/observations you wish to make.

Please refer to our background comments provided in paragraphs 1-55 above.

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Question No 11:

The Department's view is that protection of the principle of open justice, provided any legislation includes similar provisions to those within Part 2 of Schedule 27 of the Coronavirus Act 2020, can be left to a blend of secondary legislation, judicial guidance or practice directions.

Which of the following best describes what you think about this?

I agree .

I do not agree. I think the primary legislation should include a reference to "open justice" arrangements.

I am unsure.

I have no view.

Please insert any additional comments/observations you wish to make.

Please refer to our background comments provided in paragraphs 1-55 above.

Question No 12:

The Department is aware the Crown Court Rules (Northern Ireland) 1979 do not include an overriding objective similar to that mentioned within the Magistrates' Court Criminal Case Protocol or County Court. However, the level of respondents to the 2021 engagement who support "the Coronavirus Act 2020 provisions or similar" being made permanent makes the preferred approach of the Department not to immediately legislate on factors or matters which a court/tribunal should have regard to when it determines whether the use of live links should occur. The Department prefers to make secondary legislation, if required, that could set out factors or matters which a court should have regard to when determining the use of live links (See Question 3).

Which of the following best describes what you think about this?

I agree that the legislation does not need to set out specific matters or factors the court should consider when determining whether a person should participate remotely in any court proceedings.

I consider specific matters or factors should be set out in legislation as part of the court determining whether a person should participate remotely in any court proceedings.

I am unsure.

I have no view.

Please insert any additional comments/observations you wish to make.

Please refer to our background comments provided in paragraphs 1-55 above. We consider that there are most definitely factors or matters which a court should have regard to when determining the use of live links. These must be addressed in legislation, but we can agree this can be secondary legislation.

Question No 13:

If in Question 12 above you did not agree with the Department and consider specific factors or matters should be included in legislation as part of the court/tribunal determining a person's participation remotely, how many and what factors would you wish to see?

I wish to see a short list (no more than 4) specific matters or factors set out in legislation. Please add details of those matters or factors as additional comments below.

I wish to see a long list (5 or more) of specific matters or factors set out in legislation. Please add details of those matters or factors as additional comments below.

I am unsure.

I have no view.

Please insert any additional comments/observations you wish to make.

We believe that the notion of a number of factors set out in a list is an arbitrary measure. There should be flexibility in protecting the system and enhancing the experience of its participants.

Question No 14:

Which of the following statements best describes your view when considering the differing approaches adopted for England and Wales, Republic of Ireland and Scotland.

I prefer the approach adopted for England and Wales.

I prefer the approach adopted for the Republic of Ireland.

I prefer the approach adopted for Scotland.

I am unsure.

I have no view.

We believe the best practice and learning should be taken from a range of jurisdictions to provide the best policy approach and outcomes for Northern Ireland.

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