Rapid Consultation: The impact of COVID-19 measures on the civil justice system

RESPONSE OF GARDEN COURT CHAMBERS
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Introduction: Garden Court Chambers and our expertise

1. Garden Court Chambers is a multi-disciplinary chambers based in London. It has nearly 200 barristers and is one of the largest in the country.

2. Around a third of chambers practises in criminal law, and those barristers have not been formally involved in the response to this civil justice exercise. The remaining 130 or so barristers practise in the civil justice system. Some of that cohort practise in family law, and some in the Court of Protection. Our colleague Stephen Lue, has been involved in one of the leading appellate decisions on this topic: re B (Children)(Remote Hearing)(Interim Care Order) [2020] EWCA Civ 584 (referred to below). The other barristers providing material for this paper report experience from the High Court Chancery Division and the Administrative Court, in significant public law cases; in the County Courts, particularly the areas of housing law, applications and trials, and in claims for damages against public authorities; inquests, including inquest case management hearings; hearings in specialist tribunals. We are also involved in appellate work at all levels. The topics upon which feedback is being sought were already being discussed and our experiences shared amongst us. We would hope that this paper, coming from a large chambers with a broad range of experience across the civil justice system, reflects depth as well as breadth. We would hope and expect that this submission is seen as well informed and will be afforded appropriate weight.

3. At the outset we note that there may well be very different considerations in respect of large scale commercial civil litigation- particularly that funded by insurers. We are very aware from previous consultations, conferences and discussions in respect of civil justice that a one-size fits all model is often inappropriate and that lower monetary value justice often gets side-lined, or that its particular requirements are not fully understood or met. We would ask that proper regard is had during this consultation to the different forms of civil justice and their relative levels of importance and impact on an individual as opposed to a corporate entity.

4. In our practices we act predominantly for individuals or not-for-profit organisations. A large part of this work is either legally aided or, in the case of not-for-profit organisations, pro bono. Some is conducted on conditional fee arrangements. Although not always 'high value' in monetary terms this work is invaluable for the individuals and organisations concerned and can often have wider

public interest implications, playing a key role in access to justice often for disadvantaged groups and in maintaining the rule of law by holding the executive and other public authorities to account.

5. Significant cohorts of the clients we represent already face barriers in access to justice and effective participation in legal proceedings arising from factors or a combination of factors such as physical or mental disability, race and ethnic origin, language, gender, education and social class. Many have a past experience of violence and abuse and are victims or potential victims of serious human rights violation in the UK and/or abroad.

6. We are aware of extensive contributions to the debate on remote hearings. This submission is not a comprehensive review and we confine ourselves to the particular points set out below, derived from our barristers' experiences to date. We commend, however, in particular the article by Sue James in Legal Action magazine, May 2020, pp18 – 19, which discusses this topic and references other personal testimonies of lawyers and parties participating in remote hearings.

Executive Summary

7. Any discussion must start from the premise of the core principles of our common law system of open justice, fairness, natural justice and equality of arms. It must also recognise that equality before the law in practice may involve recognition of difference and differential adverse impacts arising from disadvantage relating to protected characteristics such as race, ethnicity, gender, age and disability.

8. Our position is that there should be a return to in person, face to face Court hearings as soon as circumstances allow. We understand the public health reasons for limiting those hearings at present. Justice and safety should not be in conflict. Once the pandemic emergency has lifted, we advocate a return to in-person Court hearings as the norm and as the most effective form of open, accessible and fair justice. The submissions below are made in respect of the possibility of remote hearings continuing once the pandemic emergency has ceased. Save in respect of limited categories of procedural and case management hearings, we would oppose remote hearings continuing at that point.

9. **Our headline point is that remote hearings are almost always significantly less satisfactory than in-person hearings**. Clients and practitioners have reported considerable difficulties with them. Insofar as this rapid consultation hopes to shape the way forward for civil justice "*in the longer term*", then the core message is that any benefits of remote hearings are significantly outweighed by the disadvantages. Those disadvantages are likely to lead to less justice being delivered and undermine effective access to and equality before the law. This is particularly so when it comes to the ability of parties and witnesses to participate effectively and to the legitimacy and respect afforded to the result. Further, there are real and significant extra pressures placed on

advocates and judges by these measures and no real savings of time, even additional costs and resources being required and which are not yet fully funded. At the moment, we recognise that people are working very hard, putting themselves to significant inconvenience, and putting up with substantial disadvantages in recognition of the unprecedented and truly exceptional circumstances that we are in. This should not be taken as a sign that things are functioning well or that this way of working can or should continue. Remote hearings should be recognised as a temporary expedient when otherwise the justice system could not function and only in respect of a limited category of cases.

10. We are also concerned that the problems inherent in remote hearings will diminish respect for judicial decision-making, as participants will be less able to see that a considered decision has been made after a fair process and that justice is less likely to be seen to be done.

11. We are extremely concerned at the disproportionate impact on barristers with child-care responsibilities, predominantly women, in being able to participate from home in remote hearings and suggest that this is carefully monitored.

12. We applaud the resilience of the judiciary, court staff, legal professionals and all those involved in civil justice system in making the best of remote hearings at the time of public health emergency. However, this public health crisis is unique, and the experience of remote hearings during this crisis should not form the basis of significant changes to the civil justice system as it is being operated now and certainly not in the long-term when the pandemic is over.

13. Our submissions support and recommend a return to in person hearings being the default position but taking place when it is safe for all court users and court staff to do so. Justice and safety are not in conflict.

14. We make representations below on:
    i. The privacy of hearings and of lawyer-client communications;
    ii. Stop-gap measures;
    iii. Our barristers' experiences of the limited advantages and the more substantial disadvantages, in the areas of technological competence, access for the public, litigants and witnesses, and technological resources for lawyers;
    iv. The effect on younger lawyers and on those with child-care or other caring responsibilities who are disproportionately women;
    v. Technological resources for non-lawyer participants;
    vi. Respect for judicial decision-making and the rule of law.

<u>Terms of the consultation</u>

15. The consultation was structured in this way:

"*The review is particularly interested in gathering feedback from court users in response to the following questions:*

- *What is working well about the current arrangements?*

- *What is not working well about current arrangements?*
- *Which types of cases are most suited to which type of hearings and why?*
- *How does the experience of remote hearings vary depending on the platform that is used?*
- *What technology is needed to make remote hearings successful?*
- *What difference does party location make to the experience of the hearing?*
- *How do remote hearings impact on the ability of representatives to communicate with their clients?*
- *How do professional court users and litigants feel about remote hearings?*
- *How do litigants in person experience hearings that are conducted remotely?*
- *How do remote hearings impact on perceptions of the justice system by those who are users of it?*
- *How is practice varying across different geographical regions?*
- *What has been the impact of current arrangements on open justice?*
- *What other observations would you make about the impact of COVID-19 on the operation of the civil justice system?"*

Additional issues for the consultation

Privacy/Legal Professional Privilege

16. We seek to provide evidence and submissions that cut across the individual bullet points. We should also state that the bullet points do not address some real concerns about which it would not be possible for any lawyer or client to provide actual evidence, as opposed to concerns. **These include the possibility that hearings normally held in private, such as those concerning the welfare of a child, or applications in relation to the disclosure of a document subject to public interest immunity, have not, in fact, been in private, because some other person has been able to access the hearing.** Since this is not a bullet- point issue, it will be tackled at this point. In a physical court-room, the court and parties know that that has not been the case. No- one can give a 100% guarantee that that is the case in relation to remote hearings. Similar considerations might apply to the parties' abilities to negotiate in private or to give advice and take instructions from their clients. Many of the well- known and publicly (and freely) available video platforms are known to have security vulnerabilities. Some of them will additionally have unknown security vulnerabilities. While many of these are glossed over in everyday life, and may be glossed over when confronting the exigencies of the pandemic, they are nevertheless extremely important. There is a very long list of risks if nominally "private" hearings or nominally "private" discussions surrounding hearings, are not private and legal privilege cannot be guaranteed.

17. In respect of "private hearings", the risks include:

(i) The reason for having the hearing in private, for instance, the risk that information injurious to the public interest is leaked or in order to protect the identity of a child or vulnerable person, becomes irrelevant if the hearing is not, in fact, private;

(ii) The hearing itself, taking place over platforms such as Zoom and skype for business, is dependent upon the privacy settings of the court to which the client/lawyer does not have access. Servers may collect or store information (for example where a hearing is recorded and stored in the cloud it may be stored on servers based abroad). It may not have sufficient end to end encryption. A user may be subject to different third party privacy policies than the host. Servers may be located in countries that do not necessarily comply with UK or EU data protection laws such as the USA (Zoom, Microsoft etc.). We note that where using cloud computing the Bar Council advises that it is best practice to ensure that the remote servers are within the EU or otherwise comply with EU data protection laws. The Bar Council's note as of 2 April 2020[1] stated: "*The adequacy of [the EU-US Privacy Shield] has been criticised in each annual review since then, but it remains in place. Barristers must, where using cloud computing services, carry out their own risk assessment to consider whether their use of such a service complies with their data protection obligations*". We cannot see how either barristers, or the Courts, can guarantee privacy to the parties if the hearing is hosted or recorded and kept on servers based outside of the UK or EU jurisdiction.

(iii) It is not possible to guarantee appropriate privacy from each participant. No hearing is more secure than the least secure participant's connection, which, where participants, and clients, are located in their own homes, raises important issues.

(iv) There are paid for versions of the most common conferencing platforms, but the question arises who should pay for them and, if the answer is that each individual should do so, if and how participants will be able to afford them.

18. The same points apply to the confidentiality of meetings using remote technology, whether those meetings are arranged in association with the hearing (electronic waiting rooms etc.) or separate to the hearing. At present it does not appear possible to ensure client confidentiality on any publicly available platform- paid for or otherwise. We stress the importance of lawyer-client confidentiality. The confidentiality of legal advice is not just protected by law, in the sense of legal professional privilege being respected in evidence and procedure, but as a fundamental human right: see R Derby Magistrates' Court ex parte B [1996] AC 487, per Lord Taylor (at paragraph 61) and, in paragraph 58 of the same judgment, "*It is a fundamental condition on which the administration of justice as a whole rests.*". These points thus cannot easily be ignored.

[1] Cloud Computing- security issues to consider, February 2020 available at: www.barcouncilethics.co.uk/wp-content/uploads/2017/10/Cloud-computing-2020.pdf (accessed 14.5.20)

19. Our chambers contain barristers specialising in international human rights law, immigration and asylum law and associated specialisms. Any of those cases could involve allegations concerning national security, terrorism, or even international war crimes. Some barristers regularly appear before the Special Immigration Appeals Commission. All of those clients, as with the whole of our client base, are entitled to assume that their communications with their legal representatives are secure, from state surveillance, from journalists, from other parties, or from any intrusive individual. Certainly the Secretary of State has, in the past, resisted her own expert witnesses giving evidence over video link in closed proceedings because confidentiality could not be assured.

20. Similarly, many of our client groups make claims for international protection and are fleeing persecution by State and other non-state actors. The rules protect the identity or details that may disclose the identity of the applicant, the fact that a claim has been made and the content of it from disclosure –not only to protect the applicant but also family members left behind and vulnerable to reprisal. Witnesses in such cases may also risk reprisal and guarantees of confidentiality of communication is essential in such cases: W (Algeria) v Secretary of State for the Home Department [2012] UKSC 8.

21. There is also a real need for proper information and training on the security procedures required, whether those in place meet the requirements, the privacy and security of data and communications, the risks taken and the responsibilities of lawyers is unclear. **As this is a 'rapid' consultation this response only touches the surface of some of the privacy, surveillance, security and human rights issues of the use of new technology necessary for remote hearings to succeed but it is plain that major issues arise.**

22. Even if all of the above could properly be tackled, the questions remain: is the security 100%, and what are the consequences of there being a false illusion of security? It is surprising that this was not one of the topics highlighted in the consultation. It would be foolhardy in the extreme for any long-term changes to be made without the input of cyber- security specialists.

Stop-Gap Measures

23. It is possible to respond to some of the specific questions, but only with the caveat that in every way, these measures are a stop- gap, designed to provide the least worst solution to the injustice caused where a case is undesirably delayed set against the injustice caused by it being resolved by the court using unconventional means to deal as best it can with the situation. In re B (cited above), the Court of Appeal held that the decision to remove a child from the care of his grandparent (on a temporary basis) had been unfair and should be reversed. In considering what should happen in such cases, MacFarlane LJ said (our emphasis):

"*4. In the present abnormal circumstances, the fundamental principles of substantive law and procedural fairness are unchanged. Alongside other courts and tribunals, the Family Court continues to discharge its duties, particularly in urgent child protection cases. The effective use of communication technology is indispensable to this ability to continue to deliver justice. A*

remote hearing, where it is appropriate, can replicate some but not all of the characteristics of a fully attended hearing. Provided good practice is followed, it will be a fair hearing, but we must be alert to ensure that the dynamics and demands of the remote process do not impinge upon the fundamental principles. In particular, experience shows that remote hearings place additional, and in some cases, considerable burdens on the participants. The court must therefore seek to ensure that it does not become overloaded and must make a hard-headed distinction between those decisions that must be prioritised and those that must unfortunately wait until proper time is available."

24. We note also that the same court overturned the judge's decision to have a remote hearing in another case concerning adoption of a child, having considered in detail the various guidance including from the "*LCJ's Message*" (para 6), and held that many of the procedures that are under consideration in this consultation had produced an unfair and unjust outcome in the particular case that they were considering. Although these factors would appear to us and in our expertise as inherent within the use of remote hearing in substantive matters or at least raising concerns of general application about the conduct of such remote hearings.

The Limited Advantages

25. It is important to communicate that in the wide consultation that has taken place within the cohort of barristers addressed above, not one has said that a remote substantive hearing was either better than or even equivalent overall to a hearing in person. It was recognised that the Court and its staff are doing their best. Some, but not all, barristers appreciate the use of electronic bundles but there have been specific problems emailing these to the courts and accessing them during the hearing. There are some modest features of such hearings that can be provided more easily than in an oral hearing. One example provided in our internal discussions was where counsel had recalled a relevant authority during the course of the hearing, he was able to provide a copy, in PDF format, to the judge and his opponent and make submissions on the relevant extract. This was easier and more efficient to do that than it might have been in an ordinary court hearing.[2] This perhaps could be carried forward when physical hearings resume in that Courts now usually have access to Wi-Fi and such material could be accessed. Another hearing, conducted by telephone and unopposed, was able to resolve an important point of mental health tribunal law, but in a case the client did not wish to attend and very considerable, and disproportionately onerous, steps had been taken in advance of the hearing to provide very detailed written submissions and to ensure that the court would have access to all relevant material. Although counsel in that case were assisting the court by acting pro bono, generally, each of those steps could, and should, be remunerated, so adds to the overall resources required and the costs of the hearing.

[2] This slight benefit must also be contextualised by that same counsel reporting that neither his solicitor, nor his client's family, were able to access the hearing, which concerned an important immigration judicial review.

26. There is also obvious benefits to holding purely administrative directions and case management hearings remotely which can be efficiently conducted remotely and it reduces costs in travel and waiting time considerably. We exclude these types of hearings from the analysis below except if explicitly stated.

The Experience of the Disadvantages

Technical issues, causing delay

27. There are a number of matters that are not working well in the current arrangements. In every remote hearing, there are technical issues which have to be addressed and are potentially time-consuming. This is so, even if the hearing is then able to proceed. One respondent to our discussions pointed out that those delays are likely to take the same amount of time, irrespective of the length of the hearing, so although there might be a temptation to think that shorter hearings can more easily be accommodated remotely than longer ones, the impact of those in each case takes a disproportionate amount of time relative to the length of the hearing, and if a number of hearings are to be held remotely in the same day, significantly reduces the time available to the parties and the court actually to hear their case. Telephone hearings are particularly difficult with most of those who have experienced them reporting difficulties hearing the proceedings. Some hearings have broken down all together and had to be abandoned.

28. COVID 19 has exposed the effects of chronic underfunding of the Court service which is fragile and in parts poorly resourced with what appear to be primitive and inadequate systems e.g. in terms of electronic filing and document management and using out of date digital hearing platforms such as Skype for Business (which has problems) and the BT conferencing system. We understand that no one in the Court system was preparing for this pandemic and substantial efforts have been made to respond as effectively as possible. However, this review should not ignore the fact that what is in place is necessarily ad hoc, patchy and inconsistent, not planned for or fit for the purpose of extensive use of remote hearings as a substitute for the ordinary delivery of justice in open, public, in person hearings, rather than the stopgap measures they currently are.

Access to Hearings by Litigants and Public

29. Further, the process has proved difficult for litigants, and the public, to access. This includes (a) at all and (b) seeing and understanding what is going on in court. The situations in the two reported Court of Appeal cases set out above make dispiriting reading. By way of further examples and anecdotal evidence, there are significant problems.

Litigants

30. In one remote hearing which took place in the High Court on Skype for Business there were multiple difficulties. First with access. Litigants in person were unable to join at all or remotely because of technology difficulties they had. When those issues were communicated to the court, the

Claimants' counsel suggested that those litigants in person who could not attend could apply to court to set aside any order that adversely affected them, and the judge still proceeded with the hearing (although in the event, no adverse decision was made at that hearing).

The Public

31. A number of people were interested in the same case, the eventual outcome of which might have widespread effects in their activities and local communities. Some of them, who had attended previous hearings in person, were unable to access the hearing, not having sufficient technology. Others who did take part had to go to considerable efforts to do this, and were required to disclose their identities and contact/ email addresses and so on to all the parties, where they would have preferred to maintain their to privacy. The result was that some people who wished to attend the hearing could not do so. It goes without saying that this is obviously inimical to the notion of open justice.

Other Adverse Impacts on the Hearing

32. Technological problems were also an issue. There were connection and other problems, affecting the advocates' abilities properly to address the court and to hear the submissions of others. The hearing continued but was far from satisfactory. It certainly did not result in efficient disposal of the issues and from the perspective of the affected party caused anxiety that there was not a level playing field and that they were disadvantaged. Although the outcome was in their favour, they nevertheless had the perception of technological problems in the hearing creating an unfair advantage for their opponents.

33. In the same hearing, documents that had been e- filed with the court, including an authorities bundle, had not been supplied to the Judge. This created a disincentive to refer to authority which had to be retrieved remotely from another source. Arguably pressure to carry on and not cause inconvenience impacted on the presentation of the legal argument.

34. The Judge chose not to show himself on his camera, so the hearing took place without him being visible. When specific application was made about this at a later hearing, the Judge said that it was a matter for him whether he chose to show himself on camera. Whilst the reason given related to technology, justice dispensed by a faceless person is clearly less than satisfactory and created concern amongst the litigants.

35. The litigants themselves described how they found it difficult to follow the proceedings and to understand what was being said and why compared to the previous in person hearings they had attended. This is of concern since those particular litigants had relatively high levels of education, literacy and understanding of the legal process, being active local campaigners who had chosen to concern themselves in the case.

36. In many other cases a common concern is that one or all parties have not been able to see the witness/client in circumstances where the judge has been able to. That obviously creates a potential for injustice, since the judge may be proceeding on different information and making assumptions that cannot be addressed by the parties.

37. There are fundamental difficulties in cases involving live evidence and/or multiple participants which have been regarded almost universally as unsuitable for remote hearings. Lay clients giving evidence are prejudiced by the pressure and complications it creates, the loss of the immediacy of hearing them in person and by the increased risk of misunderstanding and misinterpretation particularly where interpreters are used or the client has additional disadvantages or disability. It is harder to detect, address and challenge unconscious bias and assumption in remote hearings despite or perhaps because they are de-personalised and favour phlegmatic advocacy and interaction.

38. To make remote hearings function at all, therefore, technology is required that, at a minimum, enables all parties, their representatives, witnesses and other relevant attendees to be able to see and hear the proceedings at the same time on the same terms and with simultaneous access to relevant documents. That technology should take account of different abilities and disabilities.

Taking Instructions

39. There is also generally reported difficulty in taking instructions from both clients and solicitors, and a view that litigants themselves have been side-lined for convenience. The importance of taking of instructions contemporaneously from professional and lay clients should not be underestimated both in terms of effective oral advocacy and participation in the case.

Technological Resources for Advocates

40. There are also real problems with the differential ability of advocates to resource or participate in a virtual hearing. In modern times, it might be thought reasonable for a barrister/ solicitor to resource a proper broadband connection. However, unlike telephones, even a reasonable home network is unlikely to have the resilience, all of the time, to support a court hearing uninterrupted. Much of the responsibility for this is outside the advocate's control. The state of the broadband connections even in major cities is such that there are fluctuations in signal quality. Beyond the professional lawyer resourcing a broadband connection (of course, at their own expense), there are then further resource and participation problems. There appears to be an implicit assumption that every advocate is in a position to retreat to a quiet study, with reliable internet connections, and from that study to address the court in a comfortable and uninterrupted way. The reality is that this is not a safe assumption.

Disproportionate effect on young lawyers and those responsible for child-care or with other caring responsibilities

41. Many people, particularly younger advocates, do not have a separate study or even space to which they can insist on unfettered access and be able to provide an uninterrupted or uninterruptible service to the court. The knowledge that they cannot do this may result in instructions not being taken or if they are, adversely affect their presentation, or wrongly lead a judge to treat them differently from other advocates.

42. More fundamentally, many advocates, disproportionately women, have childcare or other caring responsibilities. At the moment, it is illegal for anyone with children (absent any independent special educational or other needs of the child) to have those children kept away from the home, or for there to be professional childcare delivered in the home. There is thus a requirement on any barrister with children at home to be able to meet the basic needs, entertain and educate their child or children. If they are a single parent, or if the other parent is also working from home, they cannot guarantee that they will be available for full-time court hours. All research on this point shows that the burden of such domestic arrangements falls disproportionately on women, so any move to lengthy remote hearings is likely to be indirectly discriminatory. Garden Court Chambers was signatory to an important letter to the Senior Judiciary signed by two sets of chambers and 157 individual practitioners from a wide range of chambers' which made some of these points extremely well. Nothing in these representations is intended to dilute the important points that were made there, and which we would ask be considered more widely in this process. But by way of further supplementation, one senior barrister in our chambers, who is herself a single parent, had this to contribute:

> "*My only remote hearing this month has been listed in May half term. Half term makes it even harder than normal as there is no "school", whether virtual or physical. I raised this with the judge who was amenable to a move but each of the other barristers (all male) said the following week was "inconvenient*".

43. It can be seen that this gave her the choice between (i) returning the case, to the detriment of herself and her client or (ii) trying to deal with the case as best she can, with her child unsupervised. It would be impossible for the single parent of a pre-school child safely to do that.

44. We consider that these are key points that affect not just the advisability, but even the legality of courts wishing to proceed with remote hearings and to expand their use. We suggest that, in particular, the effect on advocates who have child-care or other caring responsibilities is closely monitored.

Technological Resources for Non-lawyer Participants

45. Although the focus of the questions (and some of our responses) is on the lawyers, the reality is that it is about the victims, parties and witnesses. They need access to the same technology that a lawyer needs to enable a level playing field and to ensure their access to justice (whether they are represented or not). This means that even if remote hearings could result in a viable justice system, this would only ever be achievable where (in reality) every participant had a spare room, a computer, at least two screens, fast broadband and a document management system that is accessible to all participants at the same time.

46. An inherent problem with the question of what technology is necessary to make remote hearings successful is the relatively high level of digital exclusion in the UK- estimated at 10% by the ONS[3]. Some areas of the country lack reliable access to broadband and there are significant issues of connectivity in some areas of the country.

47. Some sophisticated, well-resourced parties contributing to this consultation may consider that witnesses and lay clients have sufficient access (often at a commercial party's expense) to remote hearings by using sophisticated IT, and have a chain of communication open to them which allows them to communicate with a legal team in real- time, by means of the written word.

48. That, however, is very different from the circumstances in which many of our clients operate. Not only is the subject- matter often of great emotional intensity (the removal of a child from their own care in re B above; the return of an individual deported away from his family in the United Kingdom; the arrangements for an inquest into a police shooting of the clients' relative, detention of children or vulnerable adults), but the parties are also more likely to come from a demographic less experienced in communicating with professional people to a timetable. This is even assuming that they would have the physical equipment to be able to participate: it should go without saying that someone involved in eviction proceedings is unlikely to have devoted their scarce resources to ensuring that they have high- quality audio visual equipment, or the quality of broadband that might be necessary. The Court of Appeal in B was "*entirely convinced*" of our Mr Lue's account of, "*feeling, in his words, hopelessly unable to represent his client in the way he would normally be able to do*.": see paragraph 25.

49. It should also be said that although two of the suggested topics for this consultation seek to elicit the views of "*litigants*" and of "*litigants in person*", in reality, there will be very few such respondents to this sort of consultation. We would also counsel strongly against counting responses from, say, professional associations, professional and Governmental bodies appearing to be in favour as outweighing the above concerns. The above concerns are fundamental to any system of justice and equal access to it.

Respect for Judicial Decision-Making and the Rule of Law

50. Another important point is that of perception. Nobody would say that a courtroom is democratic, or always puts everyone on the same footing: it cannot nor does it intend to do so. What it does, however, convey, is the sense that the proceedings are important and that the decision of the judge has been taken after an important process in a fair manner, has authority and is worthy of respect. That is fundamental to the rule of law.

51. There are several separate problems that remote hearings bring about, and which are intrinsic to the nature of such hearings, thus can never be eliminated entirely. First, it cannot be said that video hearings, even without interloping children, doorbells ringing, or barking dogs - see

[3] www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/articles/exploringtheuksdigitaldivide/2019-03-04

https://www.nottinghampost.com/news/local-news/barristers-lockdown-glimpse-how-courts-4082153 - have the same impact. They may trivialise the subject matter of the court proceedings. Also, such interventions of personal effects and accoutrements may only amplify the lay client's estrangement from the proceedings. The presence of a book lined study, or an amplifier with a custom decoration or political poster (Nottingham Post again) may well show how differently advocates and other professionals in the proceedings live their lives. The imposition of a "neutral" background does not provide a complete solution and is not a substitute for the environment intrinsic to a formal Court setting.

52. The second problem relates to the presentation of the proceedings, and the role of the advocate. Sometimes a disappointed litigant has at least the satisfaction of seeing that their advocate tried his/ her best, and tried to deal with every point or concern that the judge displayed. On this, not only do remote hearings prevent some of the body language cues being communicated, the technology may also deter justified interruption, but the format also reduces the ability of the advocate to use their presence to persuade. The disappointed litigant is thus short changed by their advocate's ability to impress their case upon the judge being reduced. Court proceedings, and advocacy within them, are not just about the substantive content of what has been said, and it would be wrong to assume that in every case, the recitation of the same substantive content by different people would always produce the same result.

53. Thirdly, the disappointed litigant is also short changed, and potentially adversely affected, by the judge not being present in court with them, and having to take responsibility for his/ her decision as s/he looks into the eyes of litigants, their friends, families and supporters. That can be as important to the outcome as the submissions made and is certainly a fundamental requirement of any proper system of justice. If remote hearings mean, literally, that the judge becomes more remote, the accountability of the judge/ for his/ her decision is diminished. That diminishes significantly the faith that people have in the legal system, and could significantly undermine the rule of law.

Conclusion

54. We are conscious that, in the time available, we have only been able to scratch the surface of this complex issue. We are confident that that applies to this consultation process as well. It is characterised as a "Rapid" consultation. Those that have chosen to participate will have done so under some pressure of time, and with a restricted evidence base. There are plenty of people whose views, by the very nature of their distance from the online legal profession or public bodies, will not have been reliably obtained. That being the case, it would be entirely wrong for this exercise to be relied upon in introducing any significant changes to hearings, or any long- term changes and which depart from or compromise the core principles, of our justice system. The only changes that we say can be made are those that can mitigate some of the disadvantages of remote hearings during the currency of the pandemic and which seek to balance the need, by reason of urgency and pressing subject matter, for some hearings to go ahead against the diminution in justice that such hearings suffer.

55. The pandemic has exposed that the closure and selling off of courts to fund digital justice was premature as there is no clear plan or strategy or agreed platforms to develop the service and to replace the closed courts. The use of remote hearings must not be used as an occasion and excuse to erode fundamental principles of open, fair and equal access to justice and civil liberties in the long term. We are also very concerned about the potential loss of jury trials and, where relevant, full panels with specialist wing members (e.g. Mental Health Review Tribunals) in favour of single judge courts. **Once the pandemic has lifted we will need to continue living in a democracy governed by the rule of law not governed by executive emergency powers and the expedients that they impose upon us.**

STEPHANIE HARRISON QC

LIZ DAVIES

(Joint Heads of Chambers, along with Judy Khan QC who practises in crime, of Garden Court Chambers)

(For and on behalf of Garden Court Chambers)

15 May 2020