

Remote Hearings - Emerging Issues

Paper 1 - Practice and Learning from Australia and New Zealand

Justice Analytical Services

Background

This is the first in a short series of brief papers on the use and effectiveness of remote hearings. The purpose of these papers was to rapidly highlight any emerging lessons on remote hearings that were taking place during the Covid 19 pandemic.

This paper summarises lessons learned from Australia and New Zealand. Please note: as the situation during the pandemic was dynamic the information in this paper was only current on 1 July 2020.

Main Points

- Australia and New Zealand jurisdictions both switched to remote hearings in response to the pandemic.
- Although the use of remote hearings enabled “*justice to be done*” during the COVID emergency, they were considered inaccessible to significant sections of the population. Further some hearings were considered un suited to remote practice.
- Commentators advised caution before their use became the norm.

Issues to consider with regard to remote hearings:

- **Accessibility** for remote hearings to be fair, participants need access to:
 - ✓ A computer or smart phone,
 - ✓ A reliable browser,
 - ✓ A strong stable internet connection,
 - ✓ A microphone and camera,
 - ✓ The skills necessary to use all of the above.

- **Symbolism and rituals** (for example, bowing to the Judge) can be lacking which could impact on the delivery of justice but equally could make court hearings more inclusive.
- **Open justice** could be enhanced by remote hearings as it could enable the press and the public to attend more easily BUT only where live streaming occurs.
- **Efficiency and productivity** are promoted by remote hearings but this should be weighed up against access, integrity and equality issues.
- **Technology** - as it improves, so will remote hearings.
- **Preferences** - Victims and witnesses, may prefer NOT being in the same room as the accused but on the other hand some may want the right to confront the accused.
- **The accused's** right to comprehend and participate may be compromised in remote hearings.

Advice from participants (lay and professional)

- Video is better than audio only.
- Participants from rural areas may be less likely to have stable internet connection than urban participants.
- There is a need to ensure that the Judge co-ordinates the entire proceedings.

Introduction

In order to keep the rule of law during the COVID-19 emergency, court systems across the world adapted to introduce or escalate the amount of business they conducted remotely. This included digital filing of paper work and the use of communication technology to conduct court hearings remotely.

This is the first in a series of papers that were rapidly produced to deliver emerging evidence on remote hearings, their positives and negatives, and any lessons we could usefully transfer to the Scottish context. The evidence was emerging and could be sketchy, and as such these papers were not designed to be comprehensive or rigorous. Rather, they were designed to deliver any emerging intelligence that we found that may have been of use for those developing policy and practice around remote hearings.

This is a rapid review of evidence and intelligence from New Zealand and Australia on the use of remote hearings.

Research questions

Although not all of the papers will be able to address all of these research questions these are the questions driving the reviews:

- What arrangements for remote hearings have common law jurisdictions put in place?
- What is the experience of participants in remote hearings (lay and professional)?
- What are the positives and negatives of remote hearings and lessons learned?

Remote Hearing arrangements

Both Australia and New Zealand rapidly produced or updated remote hearing protocols which detailed how they should be conducted. Here we set out brief descriptions of their arrangements.

Australia

While Australia's complex system of federal and state and territory courts undertook very little remote or digital work previous to COVID-19, "*emergency remote hearings*" were put in place across States and Territories from around the middle of March 2020, using telephone and/or video link.

In exceptional circumstances, and subject to restriction of numbers, participants were able to appear in court in person. Most courts had phone and video link technology in place by 20 April 2020. The courts were run with the same "*etiquette, protocols and procedures as physical courts*" including participants needing to be "*suitably attired*". Information on how to access remote hearings was sent to the parties in advance of their hearing.

Using the High Court as an example, a VC hearing hub was set up in the court building. Participants were expected to connect using a device (like a laptop or phone). 4G was considered unreliable and broadband connections were preferred. VC hearings were recorded, transcribed and published. Participants were asked to inform the Judge immediately if the quality of the connection made full participation un-viable.

New Zealand

New Zealand were using a combination of physical distancing courts and remote hearings. Remote participation was for some or all participants using videoconference (VC) or teleconference (phone) through Virtual Meeting Rooms (VMRs). The judge decided in each case who should attend remotely or otherwise.

Participants were emailed an outlook link to the VMR before the hearing. The Judge presided in one VMR and all other participants except the defendant/accused were in another VMR. The accused, depending where they were in custody, was linked using an Audio Visual Link or yet another VMR. The Court Registrar was the central point and normal court protocols and procedures were used.

Participants were asked to set up the 'Jabber Guest' programme before hand and given instructions. If this was not available to participants they could phone in or ask to attend in person. Journalists could join on mute and were not allowed to record. Victim advisors were on audio only.

Participants experience of remote hearings

We found only limited evidence on participants (lay or otherwise) experience of remote hearings in Australia and New Zealand and all were from civil courts. We accessed a website set up by academics to collect such data, called 'Justice Stories'¹ on 01 July 2020. The majority of information at that stage set out the experience of almost entirely lawyers with only one litigant story. A variety of experiences were recorded.

One legal participant stressed how the use of remote technology was positive in terms of saving them time and therefore money as there was no need for travel. They also suggested that it saved public funds as well. The one litigant also commented on the time and money that a remote hearing saved them. It should be noted that this participant represented a business as opposed to an individual.

A negative point was made by a legal participant who pointed to their inability to "read" the Judge's mood and sympathies, suggesting this was an important part of their job. A specific comment from a lawyer who had extensive experience of remote hearings was that video connections were almost always superior to audio only. Citing the ability to see people as overcoming some of the difficulty in reading the mood and other body language signals.

Connection and quality difficulties with technologies were mentioned in a number of stories. For one participant they were seen as an annoyance rather than a problem. Others cited poor connections and loss of signal as a barrier to the hearing being satisfactory. A further problem identified by a legal participant was the issue of rural participants having less effective internet connections than urban participants making access inequitable in hearings where people were joining from disparate areas.

¹ <https://www.monash.edu/law/news-and-events/news/articles/current/how-is-remote-justice-working-in-the-time-of-covid-19>

The importance of having the Judge conducting and stage managing the proceedings was noted by a number of participants with one suggesting that the Judge needed to act like an “*air traffic controller*” to ensure smooth running of the case.

A few lawyers concluded their stories with the observation that remote hearings were very efficient for straightforward short hearings but of no use for complex hearings².

The positives and negatives of remote hearings

Commentators in Australia and New Zealand have produced discussion papers on the potential positives and negatives of remote hearings in general. The issues may relate to civil, criminal, family or tribunal hearings. The work highlights the following issues:

- Accessibility
- Symbolism
- Open Justice
- Efficiency and productivity
- Failure of technology
- Preferences
- The accused

Accessibility

The ability to participate in remote hearings, obviously, depends on access to particular tools and skills. Commentators identified significant difficulties and that the issue is not simply about hardware. They set out the minimum requirements for participation. It is not only necessary for a participant to have access to a computer or smart phone but they also need to have access to a reliable browser, a strong stable internet connection, a microphone and a camera³. Further to this list of tangible necessities access cannot be guaranteed without participants having a level of skill with technology and comfort in using the software. This can be potentially impacted by income, age, location, and mental and physical health⁴.

As such a commentator in Australia suggested that it is necessary to make accessibility the first rule of digital justice – “*a design priority for online courts*”⁵.

Symbolism

There were mixed opinions as to whether the absence of ritual and symbolism in remote hearings is a positive or negative aspect. In an article published on the Australian Public

² <https://www.monash.edu/law/news-and-events/news/articles/current/how-is-remote-justice-working-in-the-time-of-covid-19>

³ <https://www.districtcourts.govt.nz/reports-publications-and-statistics/publications/ensuring-technology-serves-the-interests-of-justice/>

⁴ <https://auspublaw.org/2020/05/courts-and-covid-19-challenges-and-opportunities-in-australia/>

⁵ <https://auspublaw.org/2020/05/courts-and-covid-19-challenges-and-opportunities-in-australia/>

Law website commentators suggested the symbolic nature of court buildings and the dress and behaviours of its actors is a vital aspect that is missing from remote hearings.

They give examples including; the placing of the various participants in the court room, how documents are handed to the Judge and the practice of bowing to the Judge. They suggest that the symbolism of these rituals speaks to the solemnity and authority of the court, and are an integral part of the system that helps the courts administer the rule of law and achieve justice⁶.

They suggest that remote hearings cannot replicate this atmosphere. Commentators also note that this could be viewed as a positive because for many *“the ritualistic aspects of a hearing seem archaic and exclusionary”* and some litigants and witnesses, find the physical environment of the court intimidating⁷.

They concluded with a plea to proceed with caution and to consider this aspect of the courts work.

Open Justice

There were also mixed views on whether remote hearings promote open justice. Open Justice is an issue addressed by commentators in Australia, some suggesting remote hearings increase the openness of the system while others suggesting it impacts negatively on openness.

An article from commentators in Australia discussed the principle of open justice as the key to justice not just being done but being seen to be done. And they suggested that

“online hearing technology introduced in the wake of COVID-19 to facilitate remote access to justice has – for the most part – safeguarded the public interest in open justice”

The commentators gave a number of reasons for this. Two examples are that the use of technology makes it easier for both journalists and the public to access to court proceedings. And further they argued that, but for, technology the justice system in Australia would have *“ground to a halt”*⁸.

An article, that lands on the other side of this issue, is published on the Australian Public Law website. It suggests COVID-19 has endangered open justice in Australia, as the quick move to remote hearings actually put in place barriers and challenges for the public and for journalists⁹. These commentators do not think that remote hearings necessarily do restrict openness rather that solutions were not in place at the time of writing. In conclusion they say if Australia’s judiciary adopted widespread open-access live streaming, its proceedings would suddenly become far more accessible.

⁶ <https://auspublaw.org/2020/05/courts-and-covid-19-challenges-and-opportunities-in-australia/>

⁷ <https://auspublaw.org/2020/05/courts-and-covid-19-challenges-and-opportunities-in-australia/>

⁸ <https://insights.doughtystreet.co.uk/post/102g8dq/open-justice-in-australia-a-silver-lining-to-the-covid-19-cloud>

⁹ <https://auspublaw.org/2020/05/courts-and-covid-19-challenges-and-opportunities-in-australia/>

Efficiency and Productivity

Whilst new technology could greatly enhance efficiency, it does not necessarily signify integrity in the justice system. The Chief District Court Judge, of New Zealand published an article in 2017 suggesting that new technology could enhance the efficiency and productivity of their justice system. Further that it could reduce workloads and in the long run, stop unnecessary travel and potentially increase court security.

In the same article this commentator noted potential negatives that “*efficiency, speed and convenience are not, on their own, good measures of integrity in the justice system*” and suggested a cautious attitude and moderation in the move towards a wholesale digital justice system¹⁰.

Technology

As with issues above we found two sides to the discussion of technology used for remote hearings.

An article on Doughty Street Chambers website suggested that the pandemic has exposed the inadequacy of the technology available to conduct any hearing without physically attending a court building. They were optimistic about this issue and believed that not only should the technology improve but it would do so. They also pointed out that hearings can be adjourned should the Judge decide the technology is not facilitating the passage of justice¹¹.

An article on the Australian Public Law website differed, suggesting that technological failure in remote hearings is not just practical, rather it is an issue of principle, access to justice and equalities. This centered on the argument of accessibility and pointed out that there is no equality in access to digital technology (see above on accessibility)¹².

Preferences

Some commentators suggest that keeping people physically distant from each other using remote hearings can be preferred by victims and witnesses as, for example, it can save them the trauma of being in the same room as accused¹³.

On the other hand, some victims may prefer to be in court and in New Zealand (and other jurisdictions) one commentator points out they have the right to confront the defendant and to “*observe the exercise of justice*”¹⁴.

¹⁰ <https://www.districtcourts.govt.nz/reports-publications-and-statistics/publications/ensuring-technology-serves-the-interests-of-justice/>

¹¹ <https://insights.doughtystreet.co.uk/post/102g8dq/open-justice-in-australia-a-silver-lining-to-the-covid-19-cloud>

¹² <https://auspublaw.org/2020/05/courts-and-covid-19-challenges-and-opportunities-in-australia/>

¹³ <https://www.districtcourts.govt.nz/reports-publications-and-statistics/publications/ensuring-technology-serves-the-interests-of-justice/>

¹⁴ <https://www.districtcourts.govt.nz/reports-publications-and-statistics/publications/ensuring-technology-serves-the-interests-of-justice/>

The accused

The accused's ability to fully participate may be compromised in remote hearings. The article by the Chief District Court Judge, of New Zealand mentioned above set out a "*cautionary tale*" concerning remote hearings for the accused. They, she states, like victims and witnesses have the right to "*comprehend and participate*" and that there may be situations in remote hearings that are contrary to that right. For example, some defendants may find they have a less close relationship with their counsel as it is more difficult to build up a sense of respect and trust in remote meetings. Further during hearings it may, for example, be more difficult to attract counsels attention.¹⁵

¹⁵ <https://www.districtcourts.govt.nz/reports-publications-and-statistics/publications/ensuring-technology-serves-the-interests-of-justice/>

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St Andrew's House
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ISBN: 978-1-80004-409-8 (web only)

Published by the Scottish Government, December 2020