‘PART OF THE FUTURE’: FAMILY LAW, CHILDREN’S INTERESTS AND REMOTE PROCEEDINGS IN AUSTRALIA DURING COVID-19

FELICITY BELL*

In March 2020, the family law courts, like other Australian courts, moved to hearing proceedings ‘remotely’, by phone, audio-visual link or software platform. This article examines the particular circumstances of family law cases that likely impact on whether it is appropriate for remote procedures to be used. Giving context to these themes, the article reports on a survey of Australian federal judicial officers about their experiences of conducting family law proceedings remotely.

I INTRODUCTION

The rapid expansion of ‘remote’ proceedings to family law matters during the COVID-19 pandemic[1] was met with reactions both hopeful and disapproving.[2] As essential services,[3] the family law courts, like all Australian courts, remained operational but transitioned to remote hearings (those conducted by telephone or audio-visual communication platforms) in March/April 2020. The Family Court of Australia and the Federal Circuit Court of Australia — collectively ‘the family law courts’ — hear ‘private’ family law disputes pursuant to the *Family Law Act 1975* (Cth) (‘*FLA*’). The state-based Children’s Courts, which exercise jurisdiction

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* Research Fellow, Future of Law and Innovation in the Profession Research Stream, UNSW Law. The author thanks Professor Michael Legg and the anonymous reviewer for their helpful comments.

1 See World Health Organisation, ‘Coronavirus Disease (COVID-19) Pandemic’ <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>.

2 For example, an order made by telephone to remove a two-day-old baby from its mother was referred to as ‘horribly cruel’: Anna Khoo, ‘Remote Hearings for Family Courts “Horribly Cruel”’, *BBC News* (online, 4 June 2020) <https://www.bbc.com/news/uk-england-52854168>; cf Kate Allman, ‘Lunch with Registrar Brett McGrath’, *Law Society Journal* (online, 10 June 2020) <https://lsj.com.au/articles/skype-with-family-court-national-covid-19-registrar-brett-mcgrath/> (referring to the ‘opportunity’ presented by the pandemic).

3 Michael Legg, ‘The COVID-19 Pandemic and Courts as Essential Services’ (2020) 94(7) *Australian Law Journal* 479.

over care and protection matters, also moved to limit face-to-face hearings.[4] Typically, this was in line with procedures adopted by the Magistrates Courts (or Local Courts in New South Wales), of which the Children's Courts form a part.[5]

In a statement made on 26 March, the Chief Justice of the Family Court announced:

> Judges, Registrars and staff are committed to providing access to justice when called upon to do so. This includes conducting hearings both via videoconferencing through the use of Microsoft Teams or other platforms, or by telephone. The Courts are also conducting mediations electronically and through other safe means.[6]

Michael Legg has explained that '[t]he use of video conferencing [by courts] can be traced back to at least 1997 and is now used extensively in Australian courts, although usually referred to as an audio visual link'.[7] Originally, audio-visual link ('AVL') technology was developed specifically for the courts,[8] and was predominantly used to connect one participant in a remote location to the courtroom, where the main proceedings were occurring face-to-face.[9] With the onset of the pandemic, the family law courts turned also to the use of third-party software platforms such as Zoom and Microsoft Teams.[10] It was later reported that more than 80 per cent of the family law courts' work was conducted by electronic means during the period from March to May 2020.[11] Similar changes, in terms of a rapid move to entirely electronic hearings, occurred in comparable jurisdictions such as England and Wales and the United States of America. In mid-

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4 See, eg, Children's Court of New South Wales, 'Public Notice of Response to Covid-19 Pandemic No 6' (9 July 2020); Jacqueline So, 'COVID-19 and Australian Courts and Legal Bodies Updates: 27 April', *Australasian Lawyer* (26 April 2020) <https://www.thelawyermag.com/au/news/general/covid-19-and-australian-courts-and-legal-bodies-updates-27-april/220698>.

5 Children's Court of New South Wales (n 4).

6 Family Court of Australia and Federal Circuit Court of Australia, 'Statement from the Hon Will Alstergren — Parenting Orders and COVID-19' (26 March 2020) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/news/mr260320>.

7 Michael Legg, 'The COVID-19 Pandemic, the Courts and Online Hearings: Maintaining Open Justice, Procedural Fairness and Impartiality' (2021) 49 *Federal Law Review* (forthcoming); available at SSRN <https://ssrn.com/abstract=3681165> 4.

8 Ibid, citing, eg, Supreme Court of New South Wales, *The Virtual Courtroom — Practitioner's Fact Sheet* (Version 1, 23 March 2020).

9 Bruce M Smyth et al, 'COVID-19 in Australia: Impacts on Separated Families, Family Law Professionals, and Family Courts' (2020) 58(4) *Family Court Review* 1022, 1036 n 9.

10 Zoom <https://zoom.us/>; Microsoft Teams <https://www.microsoft.com/en-au/microsoft-365/microsoft-teams/group-chat-software>.

11 Family Court of Australia, 'Gradual Resumption of Face-to-Face Hearings in the Courts' (Media Release, 12 June 2020) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/covid/covid-profession/mr120620>.

June, the Australian family law courts announced a gradual resumption of face-to-face hearings for matters that could not be conducted electronically.[12]

Sharply differing views have been expressed about the benefits and detriments associated with remote hearings for family law matters. Perhaps more significantly, there are varied views about the types of family law case where electronic hearings are of especial benefit or detriment, and how these might be best identified and managed by the courts. In Australia, where the spread of COVID-19 has been relatively contained by comparison with other countries, there is nevertheless interest in the continuation of remote proceedings for some family law matters.[13] This is especially so given a general backdrop of concern about the cost of access to family law legal services, particularly if litigating.[14] Australia's large size means that some populations are geographically remote, and rural and regional areas are typically serviced by family law circuits. Indeed, given the scale of the continent, an early motivation for the use of AVL in Australian courts was to connect those living in remote areas.[15]

This article reports on a small survey of judicial officers in the Family Court and Federal Circuit Court ('FCC') about their views on conducting remote proceedings during COVID-19. These survey findings, described in Part IV, are contextualised by discussion about some of the broader issues that have arisen both in Australia and overseas about the use of remote procedures for family law matters, which are considered in Part III. In conclusion, the article suggests that remote procedures are an additional way of entering the 'multidoor courthouse' — a useful means of access but one which is only appropriate to certain types of disputes.[16]

Before embarking on this discussion, some additional background on the process by which the Australian family law courts came to take up remote proceedings in the pandemic context is provided.

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12 Ibid. With the onset of a 'second wave' in Victoria, this resumption was slowed and stopped in some locations: Smyth et al (n 9) 1033.

13 Carmella Ben-Simon and Annette Charak, 'Interview with the Honourable Chief Justice Alstergren' [2019] (166) *Victorian Bar News* 34.

14 See, eg, Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, vol 2, 2014) 846–70; Australian Law Reform Commission, *Family Law for the Future* (Report No 135, March 2019) 44 [1.41].

15 Anne Wallace, '"Virtual Justice in the Bush": The Use of Court Technology in Remote and Regional Australia' (2008) 19 *Journal of Law and Information Science* 1.

16 Frank EA Sander, 'The Multi-Door Courthouse' (1976) 3(3) *Barrister* 18; Frank EA Sander and Stephen B Goldberg, 'Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure' (1994) 10(1) *Negotiation Journal* 49.

II Backdrop: The Pandemic and the Family Law Courts' Response

In a notice to the legal profession on 19 March 2020, the family law courts indicated that matters would be dealt with 'by telephone, and *when it becomes possible*, by videoconferencing', unless a face-to-face hearing was urgently required.[17] At that time, the courts had no capacity for remote hearings by videoconference.[18] As of 24 March, registry services were provided remotely.[19] By early April, the courts reported:

> Microsoft Teams has been rolled out to each Judge, Registrar and Family Consultant. Each Judge and Registrar is now able to conduct hearings electronically from each Registry. Whilst urgent matters will be given priority, Judges now have the ability to continue to hear defended applications, trials and appeals.
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> This technology was rolled out at great speed to 101 judges, 35 Registrars and servicing up to 40 different locations.[20]

At the same time, the courts moved extremely quickly to the use of digital court files to complement this move to electronic hearings.[21]

In April 2020, the courts announced the creation of a 'COVID-19 List' to deal with an increase in urgent applications being made to the court, apparently as a result of the pandemic.[22] In a statement given in March, the Chief Justice provided guidance about how parents or carers might, if needed, ideally work together to modify arrangements for care of children that had been disrupted or rendered inappropriate by the pandemic:

> Parents are naturally deeply concerned about the safety of their children and how the COVID-19 virus will affect their lives. Part of that concern in family law proceedings

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17 Family Court of Australia, 'Notice to the Profession — COVID-19 Measures and Listing Arrangements' (19 March 2020) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/news/covid-notice> (emphasis added).

18 Smyth et al (n 9).

19 Family Court of Australia, 'Changes to Registry Services' (Media Release, 23 March 2020) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/covid/covid-profession/covid19-230320>.

20 Family Court of Australia, 'Notice to the Profession — 9 April 2020' (Media Release, 14 April 2020) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/covid/covid-profession/covid-notice-090420>.

21 Ibid. This is remarkable, given that in a December 2019 interview the Chief Justice commented that he was 'anticipating that we will have an electronic court filing system up and running soon, but it will probably take six months to roll out': Ben-Simon and Charak (n 13) 38–9.

22 Family Court of Australia, 'The Courts Launch COVID-19 List to Deal with Urgent Parenting Disputes' (Media Release, 26 April 2020) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/covid/covid-profession/mr260420> ('The Courts Launch COVID-19 List').

> can extend to a parent's or carer's ability to comply with parenting orders and what should be properly expected of them by the Courts in these unprecedented times.[23]

The COVID-19 List announcement, and subsequent Practice Directions outlined the type of matters suitable for filing in the List, including those with allegations of family violence, supervised contact arrangements, where border restrictions were creating difficulties for parents or children traveling,[24] or where a child or parent had contracted COVID-19.[25]

The shift from face-to-face to electronic or virtual proceedings may raise, generally, issues of procedural fairness and court access.[26] In family law matters there are additional issues around open justice (already, to a degree, contentious in the family law space), the safety of participants, and a more nebulous sense of what 'may be lost' with the loss of the physical courtroom.[27] This may include whether, in some cases, a virtual hearing is not appropriate due to the serious issues involved, such as where the making of an order for no contact between a parent and child is a possibility. Gráinne McKeever commented, in relation to reviews undertaken in the United Kingdom, that '[t]he overall finding ... suggests that those courts dealing with questions of law rather than contestations of fact are better suited to remote hearings',[28] but family law trials inevitably involve contested issues of fact. Further, family law disputes over children and parenting inherently involve vulnerable non-participants (children) whose best interests must be considered, and indeed are paramount in substantive decision-making.[29] Delay may be antithetical to children's interests, which must also be borne in mind when the options are to either proceed via remote hearing or to postpone. In terms of the paperwork that attends family law proceedings, modifications to the usual procedure to enable a virtual hearing may create risks. For example,

> documents that are produced on subpoena are often of a sensitive and highly personal nature and cannot ordinarily be copied. To conduct a "virtual trial" it may be necessary to allow records such as Police and Child Welfare records, personal medical records,

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23 Family Court of Australia and Federal Circuit Court of Australia, 'Statement from the Hon Will Alstergren — Parenting Orders and COVID-19' (26 March 2020) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/news/mr260320>.

24 In recognition that interstate travel had become highly restricted during the pandemic, as had overseas travel.

25 Family Court of Australia, 'The Courts Launch COVID-19 List' (n 22). See *Kocak v Fahri* [2020] FamCA 652 (noting that the case should not have been filed in the COVID-19 List).

26 Legg (n 7); *Sayid v Alam* [2020] FamCA 400, [2] ('*Sayid*').

27 Emma Rowden, 'Distributed Courts and Legitimacy: What Do We Lose When We Lose the Courthouse?' (2018) 14(2) *Law, Culture and the Humanities* 263.

28 Gráinne McKeever, 'Remote Justice? Litigants in Person and Participation in Court Processes during Covid-19' [2020] *MLRForum* 005 <http://www.modernlawreview.co.uk/mckeever-remote-justice>.

29 *FLA* s 60CA.

> (including counselling and psychologists' records) or records of sexual assault investigations, to be copied, scanned and emailed to and between parties and/or their legal representatives.[30]

In the rapidly unfolding environment of the times the Australian family law courts offered no specific guidance on managing these competing issues. This is to a large degree unsurprising, given the autonomy afforded individual judicial officers in managing their own work and courtroom practices. The Family Court's statement of 9 April explained:

> Practitioners should consider carefully whether there is any reason why trials of particular matters cannot properly be heard via Microsoft Teams. While it is new for us all, when a proper analysis is undertaken of the real issues in an upcoming trial that require factual determination, very often those can be dealt with entirely appropriately in a video hearing. If there is a dispute about whether a trial should proceed via video, the docketed Judge will determine that dispute. Practitioners should not assume that resistance to a video trial will automatically be successful.[31]

This meant that it largely came down to individual parties, lawyers and judges as to the considerations that would be factored in when it came to remote hearings. In terms of guidance from superior court level, and in terms of research, more has emerged from the United Kingdom. In that jurisdiction, too, however, the case law available to date has emphasised the wide ambit of judicial discretion when it comes to determining whether remote proceedings are, or are not, appropriate in family law proceedings.[32]

There has been little chance yet for sustained research into the use of remote proceedings in Australian family law matters.[33] In the United Kingdom, the Family Division of the Court Service undertook a two-week 'rapid consultation' in April 2020 on the use of remote hearings in family law, conducted by the Nuffield Family Justice Observatory ('FJO').[34] The FJO has now published the findings of its follow-up consultation.[35] Some small-scale research has also now

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[30] Smyth et al (n 12) 1032.

[31] Family Court of Australia, 'Notice to the Profession — 9 April 2020' (n 20).

[32] See, eg, *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583 ('*Re A (Children)*') (discussed below Part III(A)).

[33] The Australian Centre for Justice Innovation ('ACJI') at Monash University, Melbourne, is undertaking research related to remote hearings by interviewing barristers: ACJI Blog (27 August 2020) <https://acjiblog.wordpress.com/2020/08/27/have-you-appeared-in-a-remote-or-online-hearing-we-want-to-hear-from-you/>.

[34] Mary Ryan, Lisa Harker and Sarah Rothera, *Remote Hearings in the Family Justice System: A Rapid Consultation* (Nuffield Family Justice Observatory, 2020) ('*Rapid Consultation*').

[35] Mary Ryan, Lisa Harker and Sarah Rothera, *Remote Hearings in the Family Justice System: Reflections and Experiences: Follow-Up Consultation* (Nuffield Family Justice Observatory, September 2020) ('*Follow-Up Consultation*').

been conducted elsewhere — for instance, of family law proceedings undertaken remotely in Texas.[36]

It was against this backdrop that ethics approval was sought and obtained by the author in June 2020 to conduct a survey of Australian federal judicial officers about their experiences of conducting proceedings remotely.[37] The survey contained a mixture of multiple-choice questions, sliding-scale questions and comments boxes, and could be completed in 10–15 minutes. An invitation to participate in the survey was sent to all judges of the three federal courts — the Federal Court of Australia, the Family Court and the FCC — approximately 150 judges in total. Forty responses were received. Of these, 29 were judges of the Family Court or the FCC. The Family Court undertakes exclusively family law work, while the FCC's workload is approximately 90 per cent family law,[38] though it also has a general federal law jurisdiction. The results from these 29 participants, particularly those comments that refer specifically to family law proceedings, are reported in Part IV, to give context to the discussion that follows.

III Remote Proceedings — Issues for Family Law

Parties to parenting disputes have few substantive 'rights' under the *FLA*, with most rights being held by children.[39] However, the limited rights that parties to all kinds of family law disputes do possess relate to having the dispute determined by means of a fair procedure. Issues of procedural fairness arise when considering whether parties may be disadvantaged through being required to use technology. There is a separate, additional question of whether the 'humanity' of family law decisions may necessitate, in some circumstances, a face-to-face hearing. These issues must also be balanced against the benefits that remote hearings could confer on those who are in need of protection, who would prefer to avoid travel, or who would be intimidated by the physical courtroom or presence of the other party. The Nuffield FJO found that 'in some cases where domestic abuse is an issue, some parties have welcomed a remote hearing'.[40] However, the FJO also found many other communication problems, both during hearings and between parties and their lawyers, and noted that those with a disability or who required

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36 Elizabeth Thornburg, 'Observing Online Courts: Lessons from the Pandemic' (Research Paper No 486, SMU Dedman School of Law, September 2021).

37 University of New South Wales Ethics Approval HC200454.

38 Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2018 (Cth) 15, [54].

39 See, eg, *FLA* ss 43(1)(c), 60B(2)–(4), 66C.

40 Ryan, Harker and Rothera, *Rapid Consultation* (n 34) 17.

an interpreter experienced particular difficulties.[41] This Part outlines some key issues that chiefly affect family law proceedings conducted remotely.

A *Safety and Vulnerable Parties*

The use of remote technology in Australia originated with the taking of evidence from vulnerable witnesses, such as children and victims of sexual assault, to protect them from physical appearance in the same courtroom space as the alleged perpetrator.[42] There have been a number of studies undertaken as to the effect of using such procedures in these cases.[43] The use of technology has since broadened. Prior to COVID-19, technology was used to overcome issues of geographic remoteness, and frequently to connect people held in correctional facilities to the courts.[44] Somewhat ironically, however, video technology was reportedly under-used in family law matters where one party's safety or wellbeing is in issue, at least prior to the pandemic. Concerns about under-utilisation were ventilated in relation to the *Family Law Amendment (Family Violence and Cross-examination of Parties) Act 2018* (Cth), which was the subject of an inquiry by the Senate Legal and Constitutional Affairs Committee.[45] The Law Council of Australia, the national representative body of state and territory law societies, submitted that while video link and other methods, such as the use of a screen, were legally available options,

> the reason these options are not more often used by the family courts is a lack of resources to provide such alternatives. In the majority of cases, video link facilities, alternative court rooms or screens are simply not available to the Judge.[46]

A 2017 report from the United Kingdom's Ministry of Justice found a similar lack of consistency in the availability of protective mechanisms for vulnerable witnesses — for example, that 'arrangements for video link were not always

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[41] Ryan, Harker and Rothera, *Follow-Up consultation* (n 35) 2.

[42] Wallace (n 15) 3.

[43] Judith Cashmore and Lily Trimboli, *An Evaluation of the New South Wales Child Sexual Assault Specialist Jurisdiction Pilot* (New South Wales Bureau of Crime Statistics and Research, 2006); Natalie Taylor and Jacqueline Joudo Larsen, *The Impact of Pre-recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study* (Research and Public Policy Series No 68, Australian Institute of Criminology, 2005).

[44] Carolyn McKay, *The Pixelated Prisoner: Prison Video Links, Court 'Appearance' and the Justice Matrix* (Routledge, 2018) 19.

[45] The legislation enacted a prohibition on a self-represented party engaging in cross-examination of the other party in instances where allegations of family violence are raised.

[46] Law Council of Australia, 'Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018, Submission 26' (16 July 2018) 11.

honoured'.[47] Generally, both Australia and the United Kingdom appear to have been (at least prior to the pandemic) afflicted by a cultural problem in terms of a lack of proactivity on the part of individual lawyers and judges when it comes to considering video links as an option,[48] and also from under-resourcing. In a submission to the Productivity Commission in 2014, the Executive Director of Court Services for the FCC explained:

> An issue that requires further consideration is the lack of suitable telephone or video equipment on occasions. In some rural and regional locations there are no suitable video facilities and telephone reception for people relying on mobiles can be poor. The poor facilities can on occasions limit the Courts' capacity to extend these services.[49]

Unsurprisingly, then, some characterised the move to remote hearings, especially without necessitating any travel to a physical court, as potentially beneficial for participants, particularly in terms of safety and security.[50] A hearing in which all participants are remote from one another also avoids the issue of one party or witness being remote and therefore in a different position to others. On the other hand, there may be disadvantages, such as the person being separated from supports and/or legal representatives, feeling isolated,[51] and the intrusion of court proceedings into one's home:

> This breach of the border between home and the court has also been a difficulty for parties and for children. The [Nuffield] report cited victims of domestic violence feeling distressed by hearings effectively taking place in their homes. With the schools closed due to the COVID-19 pandemic there have also been significant issues with the presence of children during proceedings and the risk, for example, of parents' distress at the end of hearings being immediately evident to their children.[52]

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[47] NE Corbett and A Summerfield, *Alleged Perpetrators of Abuse as Litigants in Person in Private Family Law: The Cross-Examination of Vulnerable and Intimidated Witnesses* (Ministry of Justice, 2017) 24–5, cited by Rachel Carson et al, *Direct Cross-Examination in Family Law Matters: Incidence and Context of Direct Cross-Examination Involving Self-Represented Litigants* (Australian Institute of Family Studies, 2018) 46.

[48] See, eg, Tracey Booth, 'Family Violence and Judicial Empathy: Managing Personal Cross Examination in Australian Family Law Proceedings' (2019) 9(5) *Oñati Socio-Legal Series* 702 <https://doi.org/10.35295/osls.iisl/0000-0000-0000-1037>; Joyce Plotnikoff and Richard Woolfson, '"Measuring Up?" Evaluating Implementation of Government Commitments to Young Witnesses in Criminal Proceedings' (Research Report, National Society for the Prevention of Cruelty to Children, 2009).

[49] Steve Agnew, 'Submission 258 on Productivity Commission Draft Report — Access to Justice Arrangements of April 2014' (26 May 2014) 4–5.

[50] Allman (n 2).

[51] JUSTICE, *Understanding Courts* (Research Report, 2019) 54.

[52] Mr Justice MacDonald, 'The Remote Access Family Court — What Have We Learnt So Far in England and Wales?' (Paper for the International Academy of Family Lawyers Webinar, 21 May 2020) <https://www.judiciary.uk/wp-content/uploads/2020/05/The-Remote-Access-Family-Court-What-Have-We-Learnt-So-Far-IAFL-21.05.20-Final-1.pdf>.

Identifying, however, whether appearing remotely is likely to be a positive or negative experience for a vulnerable witness is predominantly a subjective exercise. So too is the determination as to whether a party will be disadvantaged by, or unable to properly participate in, remote proceedings. It has been suggested previously that remoteness makes it more challenging for the judicial officer to identify whether a person is having difficulties in participating.[53] This may be compounded in a situation where all participants are taking part remotely, including the judge, rather than selected witnesses only being remote.

This issue was considered in an England and Wales Court of Appeal decision, *Re A (Children) (Remote Hearing: Care and Placement Orders)* ('*Re A (Children)*').[54] That case concerned four children living at that time in foster care. The Local Authority[55] wished to place the elder two in long-term foster care and the younger two into adoption placements.[56] An appeal against an order that the matter be heard on a 'hybrid' basis (with one party in court but others remote) was successful. The Court of Appeal noted that '[f]inal hearings in contested Public Law care or placement for adoption applications are not hearings which are *as a category* deemed to be suitable for remote hearing; it is, however, possible that a particular final care or placement for adoption case may be heard remotely.'[57] The Court also listed factors to consider when deciding whether it was appropriate to hear a case remotely, or not.[58] This guidance has salience for Australian private family law cases, too.

In *Re A (Children)*, the Court described a number of factors affecting Mr A, the father of the children, related to lack of access to technology, disability, and the physical environment and circumstances under which he would be participating:

> It was accepted before the judge that Mr A did not have any technology available personally to him at home to enable him to connect with a remote video hearing. At most he would be able to do so by joining with his wife via her iPad.
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> Mr A has limited abilities, and some disabilities, which render him less able to take part in a remote hearing. He has been diagnosed as dyslexic. He is unused to reading. He has a short attention span, is emotionally fragile and brittle and quickly becomes exasperated.

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53 Magistrates Association, 'Magistrates Association Response to Judicial Ways of Working 2022: Crime Consultation' (2018) 5 <https://www.magistrates-association.org.uk/Portals/0/20%20Judicial%20Ways%20of%20Working%20FAMILY%20response%20June%202018.pdf>.

54 *Re A (Children)* (n 32).

55 The Local Authority is the relevant welfare department. In Australia, this is typically a state department such as the Department of Family and Community Services in New South Wales or the Department of Health and Human Services in Victoria.

56 *Re A (Children)* (n 32) [13].

57 Ibid [8] (emphasis in original).

58 Ibid.

> The process of joining the hearing from their home would be undertaken by Mr and Mrs A with his 15-year-old son in residence, who would be locked-down with them throughout the days of the remote hearing.
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> It is not clear how Mr A would be able to communicate with his legal team during the remote part of the hearing, but it is likely that any such communication would fall well short of that which normally applies to a lay party who is personally attended at court by a solicitor and counsel.[59]

This last point — concerning interactions with legal practitioners — has been noted elsewhere,[60] including in regard to how it might limit interactions between an accused in criminal proceedings and their legal counsel.[61] It was raised obliquely in an Australian decision, *Harlen v Hellyar [No 3]*,[62] in which Wilson J allowed late adjournment of a trial based on, inter alia, Ms Harlen's inability to be physically present with her solicitor during the trial, due to her reliance on public transport from a regional area and reluctance to travel on public transport during the pandemic; and the fact that she did not own a computer and required an interpreter.[63] Wilson J noted:

> I asked for … submissions about the approach adopted by Perram J in *Capic v Ford Motor Company of Australia Ltd (Adjournment)* [('*Capic*')] where his Honour rejected an adjournment application in the face of COVID-19 pandemic conditions. [Ms Harlen's counsel] said that the case involved an adjournment application made six weeks prior to the trial involving sophisticated parties whereas this case did not involve those circumstances with the consequence that the case was immediately distinguishable.[64]

Lack of 'sophistication' as a barrier to a party's participation is also apparent in other decisions. In *Sayid v Alam* ('*Sayid*'), Harper J held that the self-represented mother would be too disadvantaged by undertaking a six-day trial remotely.[65] In an FCC case the judge listed several factors that militated against undertaking the hearing remotely, including that the respondent was under a disability and represented by a litigation guardian.[66] In another case, there was considerable sensitive material that would need to be tendered and put to witnesses, as well as

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59 Ibid [50]–[53].

60 Ryan, Harker and Rothera, *Follow-Up consultation* (n 35); JUSTICE (n 51) 54; IV Eagly, 'Remote Adjudication in Immigration' (2015) 109(4) *Northwestern University Law Review* 89.

61 McKay (n 44) 172; Susan Kluss, 'Virtual Justice: The Problems with Audiovisual Appearances in Criminal Courts' (2008) 46(4) *Law Society Journal* 49, 50: 'concern has been expressed by practitioners that the blanket use of the technology … has the potential to alienate the accused prisoner from the court, inhibit the relationships between legal practitioner and client, and reduce the quality of justice in general'.

62 [2020] FamCA 560.

63 Ibid [27].

64 Ibid [24], referring to *Capic v Ford Motor Company of Australia Ltd (Adjournment)* [2020] FCA 486 ('*Capic*').

65 *Sayid* (n 26).

66 *Walders v McAuliffe* [2020] FCCA 1541.

multiple parties, as an Independent Children's Lawyer was representing the child's interests.[67]

B *Children's Interests*

Family law children's matters differ from other civil proceedings because of the focus on a child or children. While it is very rare for minor children to be parties to family law proceedings, they are central to parenting disputes, which typically revolve around the child's best interests.[68] Yet scholar Noel Semple has commented that, at least in the Canadian context, although substantive family law distinctively upholds a 'non-party's interests', its procedures are 'fundamentally akin to other civil litigation'.[69] Semple observes that while the child's best interests are paramount (as is the case in Australia), the process by which best interests are determined does not prioritise those same interests. Semple examines, particularly, parents who litigate over many years and vexatious litigants as examples of a child's inability to control proceedings.[70] In the limited case law on remote procedures that is available to date, parents or parties' rights to procedural fairness may clash in other ways with children's rights or interests, notably for matters involving the child to be determined expeditiously.

In commercial litigation taking place in Australia during the pandemic, such as *Capic*, the courts have now had occasion to weigh the potential disadvantages of a remote hearing against those engendered by delay.[71] In family law matters, however, delay tends to take on a greater significance, as the uncertainty it represents is already recognised as being typically inimical to children's wellbeing. Moreover, children generally have no choice about litigation commencing or continuing — they are most unlikely to be instigators of the dispute. These issues predate the pandemic, particularly that of delay, which has been widely remarked upon, including in the Australian Law Reform

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[67] *Lainhart v Ellinson* [2020] FCCA 1877.

[68] See, eg, *FLA* ss 60B(1), 60CA and 60CC.

[69] Noel Semple, 'Whose Best Interests — Custody and Access Law and Procedure' (2010) 48(2) *Osgoode Hall Law Journal* 287, 302.

[70] Ibid.

[71] *Capic* (n 64); *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd* [2020] WASCA 38. In *Seven Sisters Vineyard Pty Ltd v Konigs Pty Ltd* [2020] VSC 161 it was held that 'extending latitude' to parties, lawyers and witnesses by allowing adjournment in the face of COVID-19 conditions was not inconsistent with the overarching purpose of the *Civil Procedure Act 2010* (Vic). See Michael Legg and Anthony Song, 'Commercial Litigation and COVID-19 — the Role and Limits of Technology' (2020) 48(2) *Australian Business Law Review* 159, 167.

Commission's 2019 report into the family law system.[72] The family law courts were already engaged in various endeavours to try and clear a backlog of cases,[73] and so the prospect of further adding to that backlog is of concern.[74]

In England and Wales, several family law cases have considered the issue of delay. This may be, in part, due to a larger population and because the family law jurisdiction there encompasses both private and public law proceedings, while in Australia these are (as noted) separate jurisdictions.[75] In England and Wales, COVID-19 and the associated move to electronic hearings brought to light, in several judgments, the possibility of a clash between according fairness to the parties and the best interests of the child the subject of the dispute.

In April 2020, the President of the Family Division of the High Court of England and Wales considered the issue in a case reported as *Re P (A Child: Remote Hearing)* ('*Re P*').[76] The case concerned a seven-year-old girl who, the Local Authority alleged, had been occasioned significant harm by her mother as a result of fabricated or induced illness. The complexity of those allegations, and the evidence supporting them, was noted. The Local Authority wished the case to proceed by way of video. Delaying the case would not be in the child's best interests, it was submitted, given that she was already experiencing 'significant emotional harm by being held in limbo',[77] not knowing whether she would be returned to her mother's care. The mother submitted that fairness and justice would be compromised were the proceedings to be heard remotely.[78] The situation was complicated by the fact that the mother was unwell, having herself possibly contracted COVID-19. As the President noted, this meant that it would not be possible for her solicitors or a member of their staff to be present with her

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72 Australian Law Reform Commission (n 14) [3.84]–[3.86].

73 Family Court of Australia, 'Hundreds of NSW Families Encouraged to Resolve Lengthy Family Law Disputes during the Court's Summer Campaign' (Media Release, 2 March 2020) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/news/mr020310>. The campaign was postponed due to the pandemic.

74 This is a focus of the current inquiry by the United Kingdom Parliament's House of Commons Justice Committee into court capacity: 'Court Capacity', *UK Parliament* (Webpage) <https://committees.parliament.uk/work/481/court-capacity/>; Natalie Croxon, 'COVID-19 Leads to Concerns about Court Delays and Backlog', *Bendigo Advertiser* (21 March 2020).

75 There has been some limited reportage in Australia of issues arising in the care and protection jurisdiction, primarily related to the relevant government department suspending all face-to-face contact between children in out-of-home care and their parents: *Secretary of the Department of Health and Human Services v Children's Court of Victoria* [2020] VSC 144, [33]–[34]; Jewel Topsfield, 'Magistrate Orders Children's Visits with Parents to Continue during Pandemic', *The Age* (online, 22 April 2020) <https://www.theage.com.au/national/victoria/magistrate-orders-children-s-visits-with-parents-to-continue-during-pandemic-20200421-p54lvc.html>; Ella Archibald-Binge, '"Progress Will be Lost": Funding Cuts to Hit Aboriginal Child Protection', *The Sydney Morning Herald* (online, 29 May 2020).

76 [2020] EWFC 32.

77 Ibid [15].

78 Ibid [19].

during the hearing. The mother also required an interpreter. Ultimately, the President, noting the particular challenges of determining whether a remote hearing was appropriate in a case involving a child's welfare, explained:

> A range of factors are likely to be in play, each potentially compelling but also potentially at odds with each other. The need to maintain a hearing in order to avoid delay and to resolve issues for a child in order for her life to move forward is likely to be a most powerful consideration in many cases, but it may be at odds with the need for the very resolution of that issue to be undertaken in a thorough, forensically sound, fair, just and proportionate manner.[79]

Moreover, the President noted that the unique nature of each individual case was a compelling reason as to why individual judges or magistrates must make the decision as to whether remote proceedings are appropriate, tending against the imposition of any blanket rules. The type of case or 'seriousness of the decision' to be made might be relevant, but the President noted that 'other factors that are idiosyncratic of the particular case itself, such as the local facilities, the available technology, the personalities and expectations of the key family members and, in these early days, the experience of the judge or magistrates in remote working' would also be important.[80] *Re P* therefore almost offers 'non-guidance' as to the balancing of the child's interests and procedural fairness to one or more parties. Its unusual facts — allegations of fabricated or induced illness perpetrated by a parent being very rare — also make it ill-suited as a precedent in that regard.

To date, there are few reported judgments from the Australian family law jurisdiction where the specific issue of delay in a children's case has needed to be weighed against the prospect of engaging in a remote hearing. The issue was considered in an FCC decision where the judge found that, with reference to *Re A (Children)* and *Re B (Children) (Remote Hearing: Interim Care Order)*,[81] it would not be appropriate to hear the matter remotely:[82]

> [I]n this case, I am satisfied that the hearing cannot proceed remotely, in light of the content of the proceedings. What is at stake in these proceedings are the children's best interests. Those interests are served by expeditious hearing but potentially prejudiced by the mode of remote hearing available.[83]

In *Sayid*, the judge likewise found that the need for the court to be satisfied as to what would be in the children's best interests militated against proceeding with a final hearing:

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79 Ibid [24].
80 Ibid.
81 [2020] EWCA Civ 584.
82 *Macalvin v Harricks* [2020] FCCA 1590.
83 Ibid [23].

> The very fact that the proceedings have been in the court for now 5 years indicates the level of complexity which exists in this case. … Whilst a final hearing would be, in an ideal world, the best way of finalising the matter, I am not satisfied that in the current circumstances of the COVID-19 pandemic and the limitations that are placed upon the conduct of a hearing by electronic means, and especially where one litigant is self-represented, that the best interests of the children are necessarily going to be properly served by the conduct of a final hearing.[84]

The intertwining[85] of procedural fairness for parents and children's best interests means that the decision to adjourn or disallow a remote hearing can also be characterised as in the interest of children, as the Court of Appeal explained in *Re A (Children)*:

> Finally, in addition to the need for there to be a fair and just process for all parties, there is a separate need, particularly where the plan is for adoption, for the child to be able to know and understand in later years that such a life-changing decision was only made after a thorough, regular and fair hearing.[86]

In other words, procedural fairness may be important not only for the parties, but also for the children the subject of the decision.

At the start of May 2020, the President of the England and Wales Court of Appeal handed down another decision concerning family law and remote proceedings, *Re Q*.[87] That case was an appeal from a judge's decision to vacate a hearing that had been set down to be heard remotely, concerning a six-year-old girl who was, at the time, spending week-about time with each parent. The father's application was for the child to be in his sole care.

The history of litigation in the child's life was long, and the trial judge had found that she needed 'finality': 'she has been the subject of litigation for a considerable period of her life. She is displaying evidence of emotional harm as a consequence and this needs to come to an end.'[88] However, two days later, the trial judge reached a different decision on the question of adjournment, allowing the adjournment and finding that Q's welfare would not be compromised. The trial judge had explained, in the second judgment:

> The root of the tension in this case is a timely resolution of the matter for the sake of the child, Q, as against the need for fairness in this case. I have to balance those two

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84 *Sayid* (n 26) [13].

85 Lucinda Ferguson, 'Not Merely Rights for Children but Children's Rights: The Theory Gap and the Assumption of the Importance of Children's Rights' (2013) 21(2) *International Journal of Children's Rights* 177, 189.

86 *Re A (Children)* (n 32) [12].

87 [2020] EWHC 1109 (Fam).

88 Ibid [12], quoting the trial judge's decision of 20 April 2020.

> interests while making it absolutely clear that my paramount concern must be the welfare of Q.[89]

This change of mind about the child's welfare was one basis on which the appeal was allowed,[90] given the earlier finding that Q would suffer harm as a result of further delay.

C *Empathy and Humanity*

The Nuffield FJO reported that '[m]any respondents noted that it is extremely difficult to conduct the hearings with the level of empathy and humanity that a majority of those responding thought was an essential element of the family justice system.'[91] Similarly, a judicial officer writing anonymously on the Transparency Project website explained:

> As a judge operating remotely — whether by phone, Skype or other digital platform — you are deprived of all the means you usually use to create an atmosphere of trust, fairness and compassion from the outset. You cannot smile reassuringly at a party, cannot make any realistic assessment of their level of anxiety and nerves, cannot put them at ease by showing them you are listening intently and carefully to what they say.[92]

The reference to a reduction in trust has been noted in studies of the use of remote technologies in courts.[93]

Rowden has explained that face-to-face communication is viewed as a 'more complete' form of communication.[94] It is difficult to generalise from the research in this area — as studies have been of differing jurisdictions, using different types of media — as to whether there are tangible disadvantages in terms of outcomes for people taking part remotely.[95] Moreover, in private family law proceedings, where all parties are typically individuals (rather than corporate entities, or the state), and all are appearing remotely, these disadvantages may cancel each other

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89 Ibid [14].
90 Ibid [32].
91 Ryan, Harker and Rothera, *Rapid Consultation* (n 34) 10.
92 See Anonymous, 'Remote Justice: A Judge's perspective', *Transperency Project* (Webpage, 7 April 2020) <http://www.transparencyproject.org.uk/remote-justice-a-judges-perspective/>.
93 See, eg, Mark Federman, 'On the Media Effects of Immigration and Refugee Board Hearings via Videoconference' (2006) 19(4) *Journal of Refugee Studies* 433.
94 Rowden (n 27) 272–3.
95 See, eg, Eagly (n 60) (litigants who appeared by AVL in immigration proceedings in the United States were more likely to be deported, as they were less able to engage with the hearing or retain legal representation); Gail S Goodman et al, 'Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions' (1998) 22(2) *Law and Human Behavior* 165.

out. However, some limitations can be documented more readily: a reduction in non-verbal cues and inability to fully observe gestures, loss of eye contact or opportunity for eye contact — particularly given incongruence between the placement of a camera and placement of a screen — and general communication difficulties.[96]

In a blog for the Transparency Project, Celia Kitzinger describes the experience of 'Sarah', for whom Kitzinger acted as a support person in a medical treatment case involving a decision as to whether to cease clinically assisted nutrition and hydration of a patient (Sarah's father).[97] Kitzinger explains that communication difficulties made the hearing challenging (primarily delays in sound transmission leading to 'interruptions'), and also that Sarah did not feel 'heard' — for most of the hearing, she was also not 'seen', as the judge requested cameras be turned off.[98] This also meant that her distress was not visible to anyone except those physically present with her, 'so they didn't modify their behaviour'.[99] Kitzinger explains that while the traditional courtroom 'can feel intimidating … it is also reassuring evidence of the seriousness attached to the case and the ceremonial impartiality of justice'.[100] She comments on the loss of 'gravitas' occasioned by seeing into people's homes, and notes that 'what we found in practice was that a preoccupation with the technology distracted people's attention from the substantive content of the case'.[101] A preoccupation with the technology might, of course, reduce if it comes to be increasingly used and viewed as less of a novelty or experiment.

Sarah's final comment quoted in the piece is this: 'It felt like a second-best option. It didn't feel professional. *It didn't feel like justice*.'[102] Arguably, the fact that Sarah was not successful in the case (she was seeking that clinically assisted nutrition and hydration be withdrawn) makes this dissatisfaction even more concerning. As Kitzinger notes, while the same outcome would in all likelihood have been reached after a face-to-face hearing, this would not have left Sarah 'wondering'.[103]

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96 Anne Bowen Poulin, 'Criminal Justice and Video Conferencing Technology: The Remote Defendant' (2004) 78(4) *Tulane Law Review* 1089, 1110. However, some judges surveyed here reported that the 'pinning' feature of MS Teams actually enabled a better view of witnesses.

97 Celia Kitzinger, 'Remote Justice: A Family Perspective', *Transparency Project Blog* (Blog Post, 29 March 2020) <www.transparencyproject.org.uk/remote-justice-a-family-perspective/>.

98 In contrast, the *Federal Circuit Court of Australia Act 1999* (Cth), s 69, requires that all participants must be able to see and hear each other at all times.

99 Kitzinger (n 98).

100 Ibid.

101 Ibid.

102 Ibid (emphasis added).

103 Ibid.

It is, however, difficult to know whether some of the issues with the remote hearing — the informality between some barristers and the judge, perceptions of not feeling heard, and so on — would have been present in a physical courtroom, too. Interestingly, one domestic violence survivor quoted by the Nuffield FJO explained:

> The hearing was just 10 minutes. It was more professional. I felt heard and respected in comparison to dealing with the same [District Judge] in previous face-to-face hearings with just me and the applicant perpetrator ...[104]

For this participant, then, the experience (albeit a very brief one, compared to the hearing described by Kitzinger) was almost diametrically opposed — even perceiving the judge to be more respectful than in previous face-to-face proceedings.

The empathy and humanity displayed (or not) by judges in family law matters is not often discussed,[105] although there is an increasing focus on judicial stress and vicarious trauma.[106] Reporting on surveys of family law judges from different jurisdictions, Resnick, Myatt and Marotta have noted the importance of family law judges being empathetic, but state that displays of empathy 'must be controlled and professional'.[107] Meanwhile, writing specifically of personal cross-examination in cases involving family violence, Booth suggests that judges may be motivated to disguise their own empathy due to the primacy given to impartiality.[108] Thus, it may be that little in the way of empathy or humanity is displayed at the best of times, and there is a lack of consensus as to whether displays of judicial empathy are desirable in any event, despite the FJO findings. Accordingly, how displays of empathy or humanity are affected by remote proceedings is difficult to gauge and likely different in each case, dependent on the nature of the case, the parties and the judicial officer.

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104 Ryan, Harker and Rothera, *Rapid Consultation* (n 34) 17.

105 On judicial empathy generally, see, eg, Susan A Bandes, 'Empathetic Judging and the Rule of Law' [2009] *Cardozo Law Review De Novo* 133 <https://ssrn.com/abstract=1431230>; Rebecca K Lee, 'Judging Judges: Empathy as the Litmus Test for Impartiality' (2013) 82(1) *University of Cincinnati Law Review* 145; Kathryn Abrams, 'Empathy and Experience in the Sotomayor Hearings' (2010) 36(2) *Ohio Northern University Law Review* 263.

106 See, eg, Kevin O'Sullivan et al, 'Traumatic Stress in Judicial Officers Pre-print' (September 2020) <https://www.researchgate.net/publication/344420667_Traumatic_Stress_in_Judicial_Officers_Pre-print>; Monica K Miller et al, 'Judicial Stress: The Roles of Gender and Social Support' (2018) 25(4) *Psychiatry, Psychology and Law* 602.

107 Alexis Resnick, Karen A Myatt and Priscilla V Marotta, 'Surviving Bench Stress' (2011) 49(3) *Family Court Review* 610.

108 Booth (n 48) 716.

IV SURVEY FINDINGS

Many of the issues outlined in Part III were the subject of comment by survey participants. As noted, approximately three-quarters of the survey responses were from judges working in the Family Court or the FCC. These courts had quickly introduced Microsoft Teams ('MS Teams'), a videoconferencing platform, to facilitate the undertaking of proceedings remotely.[109] The courts already had the capacity to conduct matters by telephone and (in theory) by court AVL, although the facilities available for the latter are variable as between registries.[110] As noted, court AVL had, prior to the pandemic, also been used primarily to facilitate the attendance of a single party or witness rather than all participants being remote.[111]

Generally, participants were positive about the use of remote procedures, although this was heavily qualified in that most considered their use to be a stop-gap measure that would ideally only be used in certain, constrained circumstances, as explained below. MS Teams was the most commonly identified primary means of conducting trials (24 respondents indicated this), while phone was most common for directions hearings (23 respondents).[112]

If judges were positive about the functioning of the technology they were using (predominantly MS Teams),[113] they were more likely to express positive views about conducting proceedings remotely and about how the other participants in the proceedings (lawyers and litigants) had managed. An FCC judge explained:

> There are many positive lessons to carry forward. The use of telephone/[MS] teams for returning matters is logical and attractive to the profession. Combined with specific listing times (which I will carry forward even for in person matters) it has been welcomed and effective. Similarly, the use of remote appearance in family violence cases is a great improvement … For family violence cases, subject to issues of open and transparent justice, this has great potential. The use of [MS] teams or similar software will also be attractive as it allows both remote appearance (rather than a static presence at a registry) and it is cheap and does not require substantial investment.[114]

The reference to specific listing times refers to allocating matters a more precise time for their directions hearing — a departure from usual listing practices where multiple matters will be listed at a single time and many would then wait in and

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109 Family Court of Australia, 'Notice to the Profession — 9 April 2020' (n 20).
110 Agnew (n 49).
111 Smyth et al (n 9) 1036 n 9.
112 Cf Ryan, Harker and Rothera, *Follow-Up Consultation* (n 35) 2, reporting that '[t]elephone hearings are being used for final and contested hearings as well as for administrative and direction hearings'.
113 Participants were asked, 'How well would you say this technology has worked?', and indicated this on a sliding scale labelled 'Very poorly' at one end, and 'Very well' at the other.
114 FCC17.

around the court to be called. Seven judges commented on reductions in waiting and travel time. One explained:

> For mentions and motions (interim hearings) this is a cheaper and more efficient option for the profession and the public, even though somewhat more cumbersome for the judicial officers. If the judge lists four interim hearings at 9:30 AM and three of them run, the last matter will not get a start until 3 PM. Practitioners have advised that they would rather be in their offices working than at court waiting. Similarly for mentions, where a solicitor may travel for an hour, wait for an hour, be in a mention for 20 minutes, and travel back to the office for up to an hour, they have advised they would rather wait in the office. If they go to court they will need to charge for 4 hours. If they prepare then do other work in the office they may only have to charge for 90 minutes.[115]

These types of benefits, and to a lesser extent the protective benefits for cases where one party might be fearful of the other, were the primary ones identified by survey participants. However, in response to a question asking for their thoughts on the Court continuing to use remote procedures into the future, 10 participants expressed the view that these benefits were only appropriate for interlocutory proceedings or procedural matters.[116]

Judges were not effusive about how legal practitioners had managed the move to remote hearings.[117] Twelve thought that legal practitioners had managed 'adequately', 10 'quite well', and only three 'very well'. Two answered 'not at all well' in response to this question. Several indicated considerable differences among the profession. One noted that the profession's 'capacity is highly variable, from extremely competent to totally unable to manage the technology.'[118] Two commented that larger firms of solicitors seemed to manage the technology better but that these were more of a rarity, as family law practitioners often work in small firms that are likely less well-resourced.[119] Some also noted that there had been improvement as practitioners both became more familiar with using the technology and invested in equipment such as headsets and microphones.

In family law proceedings, parties are expected to attend court with their lawyer, even for procedural matters.[120] It is therefore usual for the judicial officer to be able to see the parties even if they are legally represented. Three judges noted

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115 FCC29.
116 FCC13, FCC18, FCC20, FCC25, FCC26, FCC30, FCC35, Fam16, Fam21, Fam24.
117 Participants were asked: 'Thinking generally, how have the legal practitioners appearing remotely (by AVL, third-party software, or telephone, as selected) in your matters, managed the use of the technology?'
118 Fam6.
119 FCC25 and FCC29.
120 This is a matter of convention only, rather than being addressed in court rules.

that initial limitations on the number of people that MS Teams could display at any one time[121] meant that it was not always possible to see everyone, but this had been resolved: 'When it has worked well, it's been great. The pinning feature on [MS] teams where 9 people can appear on screen (rather than 4 as was previously the case) is very useful.'[122]

In line with some of the reported judgments discussed above, there were mixed views on whether self-represented litigants ('SRLs') could adequately manage the technology. Some noted that it might be more difficult for people to engage with the proceedings, depending on the environment where they were located: 'The [SRLs] were at times unable to focus. This was dependent upon where they were whilst using the technology.'[123] One judge said: 'I have concerns about who is in the room, if children are present'.[124] Another commented: 'It did work with SRLs but some had very little conception of what was happening and because of this (and other reasons), I abandoned the hearing.'[125] Concerns about how parties were managing included the judge's ability to assist if a party seemed not to be coping well: 'If a party becomes distressed the options available with a live hearing are not available by remote hearing. For example counselling assistance provided by [Legal Aid] is not available on the day etc.'[126]

From its inception, the Family Court was intended to function as a 'helping court' that would provide assistance to litigants and discourage strict adversarialism.[127] Interestingly, while many comments (given in response to a question about the judge's role[128]) related to concerns about a loss of formality, the opposite view was also expressed. A Family Court judge said:

> I have used [an audio-visual platform] for hearings — it works well to a certain extent but it does not facilitate less formality which is often of benefit in family law hearings — it is very rigid and there is far less ability to interact with counsel but particularly with the parties.[129]

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121 Fam6, FCC17, FCC28.
122 FCC28.
123 FCC30.
124 FCC16.
125 FCC20.
126 Fam3. See also Smyth et al (n 9) 1032 (noting the inability for remote litigants to access services typically provided at the courts).
127 See Shurlee Swain, *Born in Hope: The Early Years of the Family Court of Australia* (UNSW Press, 2012) ch 2; and Helen Rhoades, 'The Family Court of Australia: Examining Australia's First Therapeutic Jurisdiction' (2010) 20(2) *Journal of Judicial Administration* 67, 69.
128 Participants were asked, 'Have you experienced any difficulties in ensuring that your role and impartiality have been appropriately communicated?', and could indicate this on a sliding scale labelled 'No difficulties' at one end, and 'Considerable difficulties' at the other.
129 Fam5.

More typical comments, however, described the judge's attempts to preserve the seriousness of the courtroom space. Several referred to wearing robes, sitting (alone) in the courtroom or displaying a court backdrop on their screen, and generally emphasising the formal nature of the proceedings.

Judges also had differing opinions as to whether their view of witnesses was impeded by the use of technology. Some thought that their view was better (closer),[130] while others felt that they were missing important cues.[131] For example, one judge noted that 'it reduces the ability to observe parties and their demeanour which is critical in family law matters'.[132] While some survey participants acknowledged difficulties in affording procedural fairness,[133] most did not perceive this to be a particular problem, but rather were more concerned by the parties' perceptions:

> I don't think there has been any problem in affording procedural fairness in a formal sense (and all of our litigants in final hearings have been represented) but I suspect the perception of the litigants in having a remote person on a screen make significant decisions about the parenting arrangements for their children is less than optimal.[134]

Overall, many judges commented that they had been surprised by how well, and how quickly, the courts and judicial officers had managed to adapt to the unusual circumstances. For some, these new ways of working had welcome aspects that they felt ought to be continued. For others, the circumstances were born from necessity and, while functional, were felt to be far from ideal.

V Concluding Discussion

The range of views expressed by judges in the survey largely coalesced around the sentiment that 'technology should augment and not replace access to the physical Court'.[135] Time and cost-saving elements were widely identified as beneficial, but difficulties with communication (related both to the technology itself and to human error) could render remote proceedings frustrating and tedious.[136] Judges' own experiences, comfort or discomfort in conducting remote proceedings are

130 FCC13, FCC14, FCC18, FCC32.
131 Fam11, FCC12, FCC35, FCC36.
132 FCC32.
133 Fam3, FCC15, FCC17, FCC21, FCC23, FCC25. Participants were asked, 'Have you experienced any difficulties in ensuring procedural fairness (eg affording an opportunity to be heard and advance arguments, examine witnesses, and so on)?', and could indicate this on a sliding scale labelled 'No difficulties' at one end, and 'Considerable difficulties' at the other.
134 Fam10.
135 FCC17.
136 This resonates with the findings of Ryan, Harker and Rothera, *Follow-Up Consultation* (n 35) 2.

key, however, given the role that the judge plays in managing court events. One survey participant explained that

> lawyers and litigants alike are out of their comfort zones and all look to the judge to set the tone, pace and structure of the hearing. Communicating the process and taking control of the process is not difficult (until the technology fails).[137]

Observation of family law proceedings conducted remotely (by Zoom) in Texas led the researchers to conclude that 'the most successful judges' were able to use Zoom to 'control' the proceedings.[138] Concerns about control were not explicitly expressed by any judges in this survey, although it seems likely that the confidence displayed by the judge in conducting the remote hearing would assist the participants, as the quote above suggests. Some judges perceived that problems with the technology and the online space generally affected the other participants more than themselves — however, several expressed the view that they found conducting proceedings remotely more fatiguing — while others felt that their role on the bench simply did not translate well to the virtual space. Perhaps the most strongly worded comment in this vein was as follows:

> [M]y one experience of using the technology to hear the last day of a part heard trial was more than enough. My ability to conduct the trial in the manner I would normally adopt honed after 20 years on the bench was completely obliterated by the artificial environment.[139]

Others did not see their role as especially different in the online environment. One explained: 'The very few issues I have had have all been with self represented litigants who, I suspect, would have been just as difficult to manage in person.'[140]

Alongside concerns about how well matters could be managed in the new environment were bigger-picture issues associated with the experience and perceptions of parties in having their matter heard in this way. Rebecca Aviel has noted, in the United States context, that most parties in family law disputes 'want proceedings that are shorter, simpler, cheaper, more personal, more collaborative, and less adversarial'.[141] However, whether this extends to litigants wanting remote hearings is a different question. As discussed below, absent an ongoing pandemic, parties must have input into whether their matter is suitable to be heard remotely. In the words of one Family Court judge: 'Remote procedures

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[137] Fam6.
[138] Thornburg (n 36) 12.
[139] Fam5.
[140] FCC31.
[141] Rebecca Aviel, 'Why Civil Gideon Won't Fix Family Law' (2013) 122(8) *Yale Law Journal* 2106, 2109.

will be part of the future but experience tells me that it is a lesser service than face to face hearings.'[142]

Some responses alluded to the tensions inhering in the 'efficiency' of remote hearings juxtaposed with concerns that it might be delivering such a 'lesser service'. Two FCC judges expressed fears that the use of remote procedures into the future might impact on face-to-face circuits (ie that regional circuits would be cut back or replaced by a judge undertaking the work remotely from one of the permanent registries).[143] Another commented positively that the need for circuits would be reduced.[144] Given long-standing complaints over the funding of the family law system and a prioritisation of 'efficiency',[145] it seems likely that using remote procedures as a cost-saving measure is of interest to the court administration.[146] The Chief Justice had, pre-pandemic, expressed an interest in increasing the use of technology for parties in regional areas and those who might be at risk.[147] This is problematised by the findings of research, and court decisions, discussed above in Part III, and by the comments of some judges in the survey. For instance, those living outside of Australian capital cities experience poverty at higher rates and have lower rates of 'digital inclusion'.[148] As identified in the final report of Lord Justice Briggs into the possibilities of an online court system for England and Wales, a substantial concern would be how to assist persons who would experience difficulties in using computers to resolve their disputes.[149]

Frank Sander's concepts of the multi-door courthouse, and later of 'fitting the forum to the fuss', have been influential in the design of alternative dispute resolution processes and in presenting parties with a range of accessible means by which to solve their problems.[150] In family law, there is long-standing interest

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[142] Fam6.

[143] FCC17, FCC19.

[144] FCC20.

[145] See, eg, PwC, *Review of Efficiency of the Operation of the Federal courts* (Final Report, April 2018) <https://www.ag.gov.au/sites/default/files/2020-03/pwc-report.pdf>.

[146] See, eg, Registrar McGrath, quoted in Allman (n 2): 'we are delivering justice faster than we would without the technology'.

[147] Reported in Ben-Simon and Charak (n 13) 39.

[148] Julian Thomas et al, *Measuring Australia's Digital Divide: Australian Digital Inclusion Index 2020* (RMIT and Swinburne University of Technology, Melbourne) 6–9, reporting (at 6): 'In 2020, digital inclusion is 7.6 points higher in capital cities (65.0) than in rural areas (57.4).' This score is calculated by reference to multiple variables, including regularity of internet access, mobile and fixed data allowances, and attitudes and skills when it comes to using the internet.

[149] Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales, July 2016) 38–41. The concern has remained as online processes have been rolled out in the English court system: House of Commons Justice Committee, *Court and Tribunal Reforms: Second Report of Session 2019* (31 October 2019) 16.

[150] See, eg, Forrest S Mosten, 'Mediation and the Process of Family Law Reform' (1999) 37(4) *Family and Conciliation Courts Review* 429, 438; Sander (n 16). The phrase 'fitting the forum to the fuss' was coined by Maurice Rosenberg, 'Let the Tribunal Fit the Case, Remarks at a Meeting of the American Association of Law Schools' (1977) 80 *Federal Rules Decisions* 147, 166.

in the idea of differentiated case management and how it might be used to direct cases to the channels most appropriate for them.[151] Given the experience of rapid transition online during the pandemic, it is arguable that remote proceedings must now be seen as an additional available means of resolving (through judicial determination) disputes. It is likely that remote procedures will not be appropriate for many disputes but may be suitable, or indeed preferable, for some kinds of disputes or parts of disputes. For example, there was widespread support among survey participants for the continued use of remote procedures for directions hearings and some interlocutory proceedings.

Sander and Goldberg identified a central question as being the nature of 'the disputants' goals in making a forum choice'.[152] This will also be key in decision-making about whether remote proceedings are suitable or not. For some matters, or for some court events, appearing remotely may not result in parties receiving a lesser service but will, rather, enable convenience, time and cost savings, and safety, without compromising (either in actuality or in perception) the proceeding. However, the subjectivity of the disputants' goals and circumstances mean that decisions about using technology in place of face-to-face hearings should be made having regard to the specific nature of the case at hand (including factors such as volume of evidence, length of time needed, type of proceeding), as well as the views and aims of the parties and their lawyers.

Moreover, vulnerable participants should still have the option of participating safely in face-to-face proceedings if they so choose; the use of technology should not be a substitute for ensuring safe access and egress from court buildings, provision of safe rooms in which to wait, and adequate security personnel and screening. In parenting decisions, adverse impacts on parties are also likely to be suffered by children, in that, if decision-making is delayed or compromised, children will bear the brunt of poor outcomes. Fairness to the parties must be balanced against children's best interests. In a pandemic context, this may mean that it is preferable to avoid delay and reach a decision more quickly. Equally, it may mean that, especially where there are serious issues to be determined about a child's time with a parent or the risks to a child in the care of a parent, a remote hearing is not appropriate.

To this end (and assuming a time when pandemic conditions subside, and the use of remote procedures going forward is not necessitated for health reasons), it would be useful to have guidance as to the types of case that might be

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[151] See, eg, Andrew Schepard, 'The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management' (2000) 22 *University of Arkansas Little Rock Law Review* 395, 397; Rebecca Aviel, 'Family Law and the New Access to Justice' (2018) 86(5) *Fordham Law Review* 2279.

[152] Sander and Goldberg (n 16).

suitable for the use of remote proceedings.[153] The likely disjuncture between the views of litigants themselves and the perceptions of lawyers and judicial officers, identified by the Nuffield FJO,[154] also need to be explored.

153 As Smyth et al (n 9) identify, the guidance of the courts of England and Wales is a useful starting point.

154 Ryan, Harker and Rothera, *Follow-Up Consultation* (n 35).