

The Advocate's Gateway

Supporting Participation in Courts and Tribunals

Toolkit 19

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The Advocate's Gateway toolkits aim to support effective participation in the legal process. This toolkit reflects the results of a study about participation in a wide variety of courts and tribunals. Other toolkits on *The Advocate's Gateway* refer to rules and practice in specific courts and the [Cases](#) section in particular includes recent cases about participation organised according to the type of case. The aim of this toolkit is to address more generally what participation entails, why it matters and the implications for practitioners who work with lay participants in any court or tribunal. The materials in this toolkit, including good practice examples, are derived from the book *Participation in Courts and Tribunals: Concepts, Realities and Aspirations* (Jacobson & Cooper eds., 2020) published by Bristol University Press. Publication of the e-book is sponsored by the Nuffield Foundation which also generously funded the research project upon which the book is based. The views expressed in this toolkit are those of the authors (Penny Cooper, Jessica Jacobson, Gillian Hunter and Amy Kirby) and not necessarily the Foundation. Visit www.nuffieldfoundation.org.

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1. INTRODUCTION, CONTEXT AND TEN POINTS OF PARTICIPATION

- 1.1** It is a long-established legal principle in England and Wales that people should be able to participate effectively in the court and tribunal proceedings that directly concern them. The principle is expressed in statute, case law, procedure rules, practice directions and guidance. There has been a significant focus on the participation of those who are deemed ‘vulnerable’, a term that is defined and addressed in different ways depending on the applicable court or tribunal rules and guidance. Despite the significance of effective participation as a principle in English law, the concept of participation has to date been subject to little critical analysis or empirical investigation. In law, the issue of participation is not solely relevant to those who are deemed ‘vulnerable’, but to lay users generally. Accordingly, the guidance in this toolkit is relevant to the participation of *all* witnesses and parties in *all* courts and tribunals.
- 1.2** This toolkit draws on the findings of research conducted by the authors which involved 159 interviews with judges, lawyers, court staff and other practitioners and over 300 hours’ observational research conducted in in the criminal courts (both Crown and magistrates’), Family Court, Employment Tribunal and First-tier Tribunal (Immigration and Asylum Chamber).
- 1.3** The study found that practitioners do, by and large, make sincere efforts to help lay users (i.e. witnesses and parties) participate in proceedings; yet many barriers to participation remain which can leave users marginalised in hearings.
- 1.4** It is the responsibility of all those who work in courts and tribunals to understand these barriers and take steps to help users overcome them.
- 1.5** This study has given rise to a provisional framework, *Ten Points of Participation*, to guide practice as well as future policy and research aimed at supporting participation in judicial proceedings. The framework is based on practitioners’ varied understandings of what participation entails and why it matters.

1.6 ***Ten Points of Participation*** (see pages 7 to 9 below) can help all justice professionals who work in courts and tribunals to reflect on their own understandings of participation and thus their approach to court and tribunal users before, during and after a hearing. For example, *solicitors and barristers* might consider:

- Which aspects of participation, if any, are important to explain to their clients and witnesses?
- Will it be beneficial to discuss explicitly with lay users their expectations of participation, and how their participation contributes to the overall hearing process?
- How the *Ten Points of Participation* could inform witness preparation?
- How the *Ten Points of Participation* could inform advice to clients?

All justice professionals have an important part to play in supporting effective participation of lay people, including *the judiciary and magistracy* who manage hearings and oversee the effective participation of lay people. Examples of good practice from judges and magistrates are shown on the following page. Those responsible for case and hearing management **are encouraged to consider how the *Ten Points of Participation* could inform judicial case and hearing management.** In addition, *the senior judiciary* play an important leadership role in efforts to bring about cultural change within the courts and tribunals system.

GOOD PRACTICE EXAMPLE

In the magistrates' court at a preliminary hearing, when the defendant refused to engage with the mental health worker, the legal adviser engaged with the defendant's supporter via his interpreter to encourage the defendant to communicate.

GOOD PRACTICE EXAMPLE

In the magistrates' court at a preliminary hearing, a defendant with mental health difficulties was accompanied by a support worker and her lawyer stood next to her in the dock during the hearing.

GOOD PRACTICE EXAMPLE

In the Immigration and Asylum Chamber, the judge explained at the outset that he would not be making a final decision that day and spoke directly to the applicant telling her that if she does not understand something or would like a break, she must say so.

GOOD PRACTICE EXAMPLE

At a case management hearing in the Crown Court, the judge apologised to the defendant for the discussions between the judge and the prosecution being "quite incomprehensible" and explained that defence and prosecution lawyers have to do certain things and go through a particular process.

TEN POINTS OF PARTICIPATION: PRACTITIONER ACCOUNTS

Justice practitioners variously described participation as including the following:

1.7 Providing and/or eliciting information for the court

They've got to be able to express themselves, I mean, they've got to be able to say what they want to say in a court setting. They've got to know what ... they should be saying and what documents they ... should be producing. [judge; immigration]

Well, to be able to participate, really, you need to be well enough to read documents, take it all in, work out how to structure your arguments and take part in asking questions of witnesses, work out who to call as witnesses and which documents to ask for. [judge; employment]

1.8 Being informed

The most important part of effective participation is having an understanding. That's having an understanding of the case that's against them. Having an understanding of what everybody is saying about them and what the whole trial process is. [intermediary; criminal]

1.9 Being represented

[Court users] have to tell me their story. And, it is my job to make sure they can. ... It's much easier if they've got legal representation. [judge; immigration]

Without the benefit of having a legal advocate, I see parents floundering in court proceedings, not understanding the very basics of even attending at court. [Cafcass officer; family]

1.10 Being protected

I had a gentleman that was elderly and hard of hearing, so again, I would have addressed that with the solicitors, who then raised it with the bench, who then accepted that the individual wouldn't have to stay standing and made sure that

things were fully explained during that process. [liaison and diversion worker; criminal]

1.11 Being ‘managed’

I think it's then more about how lay people are handled. For instance, to be told in advance that they should answer the questions put to them, and even though they might have other things that they know, to be told that [these things] aren't necessarily relevant, would help. [magistrate; criminal]

1.12 Being present

[If] they're not present at the hearing, they don't participate effectively [solicitor, family]

In fact, you participate by turning up. [barrister; immigration]

GOOD PRACTICE EXAMPLE

[The defendant] struggled to speak in front of multiple people, and he also found it difficult to give eye contact... I supported the recommendation that he should leave the courtroom and go and give evidence via live link, because basically the difference was he [otherwise] couldn't do it. He felt like he could not do it if he had to do it in a courtroom, sitting in the witness box, but he felt like he could do it if it was over video link and I was sat next to him.

[defendant intermediary, criminal, in interview]

GOOD PRACTICE EXAMPLE

In a Crown Court trial, a defence barrister took the opportunity of a break in proceedings to tell the judge that his client had been having heart palpitations, at which the judge asked the defendant about his health and added: *“giving evidence in the Crown Court, whatever the circumstances, is very stressful ... If you feel unwell, please say so.”*

TEN POINTS OF PARTICIPATION: PRACTITIONER VIEWS

Justice practitioners variously understand the functions of participation as follows:

1.13 Participation is the exercise of one's legal rights

[Participation] is a fundamental principle of our justice, isn't it? ... I think that any person who is facing a crime has their absolute right to be heard and participate in that hearing. [legal advisor; criminal]

[Participation] is essential, absolutely essential. It goes to the basic tenet of justice must be seen to be done. If you're made aware that someone doesn't have the ability to follow the proceedings, whether it be because they don't speak the language, whether they have some disability, whether they have a lack of ability to concentrate on matters or understand matters, then all those factors need to be taken into consideration in order to ensure that they have a fair trial. [judge; family]

1.14 Participation enables decision-making by the court

The question, I suppose, you pose to yourself, as a judge, in any particular case is: What's going to help these parties give their best evidence so that you can reach the best decision and they can leave more confident that what they've experienced is justice? [judge; employment]

As the professionals ... we want to hear what they've got to say. We want them to give their best evidence. Particularly with family cases, we want to make sure that we've got all of the available information, so that the right decisions are being made in relation to the child who's at the centre of it. [legal advisor; family]

1.15 Participation legitimates court processes and outcomes

I think participation means being able to participate in every sense of the word and feel that you've had the opportunity to do that as well. ... Everybody needs to ... feel that they've been listened to. That's the fairness of it. [solicitor; family]

Issues like equal treatment should be as important if not more important, frankly, than getting it right, because that really deals with how, when somebody leaves the courtroom, they should feel that they've had a fair hearing. There should be no doubt in their mind that everything they wanted to say has been said. [judge; immigration]

1.16 Participation offers potential therapeutic benefits for the lay user

For the complainant it's a step towards feeling, 'I'm in charge on this occasion. I've been able to do it.' ... Especially if they've been the subject [of] sexual abuse, it gives them some closure, it gives them a sense of empowerment. [judge; criminal

GOOD PRACTICE EXAMPLE

In a private law family case in which both mother and father were unrepresented, the legal advisor explained to them how the proceedings would run and said: *"If you feel lost, do ask me."*

GOOD PRACTICE EXAMPLE

I think in the employment tribunals, to show that people have participated effectively, we want the two people walking away to feel like ... they've been heard, and that whatever the outcome, they can accept it because they were able to fully participate in that process. [employment lawyer, in interview]

GOOD PRACTICE EXAMPLE

"Don't worry about that; we're taking it from square one," one employment judge told a claimant who had apologetically said he had never been in a court before. Another employment judge lent her own highlighters to a claimant, saying that the best way of preparing for his questioning of the respondent was to read through the latter's statement closely, and mark up those passages he disagreed with.

2. ENHANCING PARTICIPATION: INTERNATIONAL EXAMPLES

There has been widespread cross-fertilisation of ideas between jurisdictions, but this has tended to be ad hoc and uncoordinated. The examples below demonstrate innovation in the way in which proceedings are held, though these adaptations will not be suitable or appropriate in all cases. Most initiatives are under-researched, narrow in scope, and are temporary ‘fixes’ rather than systemic efforts to reform court culture. However, studying practice in jurisdictions other than England and Wales may provide fresh ideas for policy makers, practitioners and researchers.

- **The intermediary role** can take a variety of forms: some intermediaries relay questions, others conduct the questioning themselves, others (as in England and Wales) help plan communications and only step in if questioning breaks down. The role was established for child witnesses in South Africa in 1992, with the aim of reducing trauma associated with giving evidence. The intermediary accompanies the child witness in the video link room, translating and relaying questions into child- appropriate language. In Norway, the intermediary is a specialist forensic interviewer who interviews child witnesses while observed by the judge and counsel from an adjoining room via video-link or one-way glass.
- **Court facility dogs**¹ are specially trained to accompany and support witnesses while they give evidence. The first recorded instance of such provision was in the US state of Mississippi in the early 1990s. It has since spread to most of the United States: the Courthouse Facility Dogs Foundation states that as of November 2019, 234 facility dogs were working in 40 of the 50 states. Court facility dog schemes are also in existence in Canada, Chile, Australia, Belgium, France and Italy.

¹ It is important to note the difference between ‘therapy dogs’ (also known as ‘companion dogs’) and ‘facility dogs’ in the justice system. Therapy dogs support a witness before and/or after an investigative interview or hearing. Facility dogs accompany a witness while the witness gives evidence and are specially trained to do so.

- **Specialist hearing suites** provide calming environments for vulnerable parties or witnesses. For example, the Glasgow Evidence and Hearings Suite opened in November 2019, designed for vulnerable witnesses to give evidence remotely, away from the formality of a traditional court room. The suite includes a calming ‘sensory room’ with special furnishings. Children’s courts in several parts of India have facilities and waiting areas for children, equipped with toys and books.
- **Ground Rules Hearings** are a judicial case management tool for setting the parameters for the treatment of a witness or party at a hearing so that they may participate effectively (see also Toolkit 1 and the Ground Rules Hearing Checklist). The practice originated in England and Wales when a hearing was requested by witness intermediaries. They are now an established feature of the English legal system in cases where court/tribunal users are deemed vulnerable, and feature in the criminal justice systems in Scotland and three Australian states. In some jurisdictions ground rules hearings have been written into primary legislation.
- **Pre-recorded witness testimony in full** is one of the ‘special measures’ for vulnerable and intimidated witnesses in criminal courts in England and Wales. It was introduced by the Youth Justice and Criminal Evidence Act 1999 however provision for pre-recorded cross-examination (section 28) was the last of the special measures to be implemented. Piloting began in 2014 and, at the time of writing, national roll-out is not yet complete. In Australia, in contrast, pre-recording of child witness evidence in its entirety has long been commonplace in most states.

3. TEN POINTS OF PARTICIPATION AND GUIDANCE FOR LAY COURT & TRIBUNAL USERS

3.1 As well as providing a framework for practice and policy development, the **Ten Points of Participation** could also shape guidance for lay users about what to expect in a hearing. For example:

	WHAT PARTICIPATION ENTAILS	GUIDANCE MIGHT COVER
1	The provision and/or elicitation of information for the court	The way the lay user can provide information (including evidence) and how the court will provide it to the user
2	Being informed about proceedings	Sources of information about how the hearing works and sources of advice on use of accessible language without reliance on legal jargon
3	Having legal representation	Sources of legal representation and information about funding so that participants may consider representation and understand that it is intended as a facilitator of, not a substitute for, their participation
4	Protection of well-being	Adaptations (including but not limited to ‘special measures’ in criminal cases) and how they may be sought and applied according to the needs of the lay user and the case
5	The ‘management’ of the lay user, such that disruption to proceedings is minimised	The lay user’s responsibilities and potential consequences (for the individual and the court process) of disruption
6	Presence at proceedings	Implications of virtual versus physical presence, and the bases on which informed choices might be made (where applicable) about whether, and how, to attend proceedings
	FUNCTIONS OF PARTICIPATION	GUIDANCE MIGHT COVER
7	The exercise of legal rights	What legal rights are and how they differ depending on the type of lay user and court
8	Enabling court decision making	How the lay user’s participation can facilitate decision making
9	Legitimation of court processes and outcomes	How having a ‘voice’ in proceedings can contribute to perceptions of the fairness of the process and outcome
10	Potential therapeutic benefits	Potential benefits to the individual, separate from the legal outcome, that may arise from participation

GOOD PRACTICE EXAMPLE

In a case management hearing in the Family Court, the judge spoke directly to the unrepresented applicant, explaining what directions were being made and why, including the need for DNA and enhanced police checks.

GOOD PRACTICE EXAMPLES

In the Employment Tribunal, the judge directly interacted with both parties and clearly explained processes and reasons behind her decision-making. She told both parties that she would issue a written judgment and they would have a copy in writing.

In another Employment Tribunal case, the judge took a great deal of care to ensure that all lay users, especially the unrepresented claimant, understood what was happening. The judge offered explanations when it appeared that the claimant did not understand procedure and on a number of occasions told the claimant not to apologise for their lack of understanding. The judge offered to change the lighting level in the hearing room if it would make it easier for the claimant.

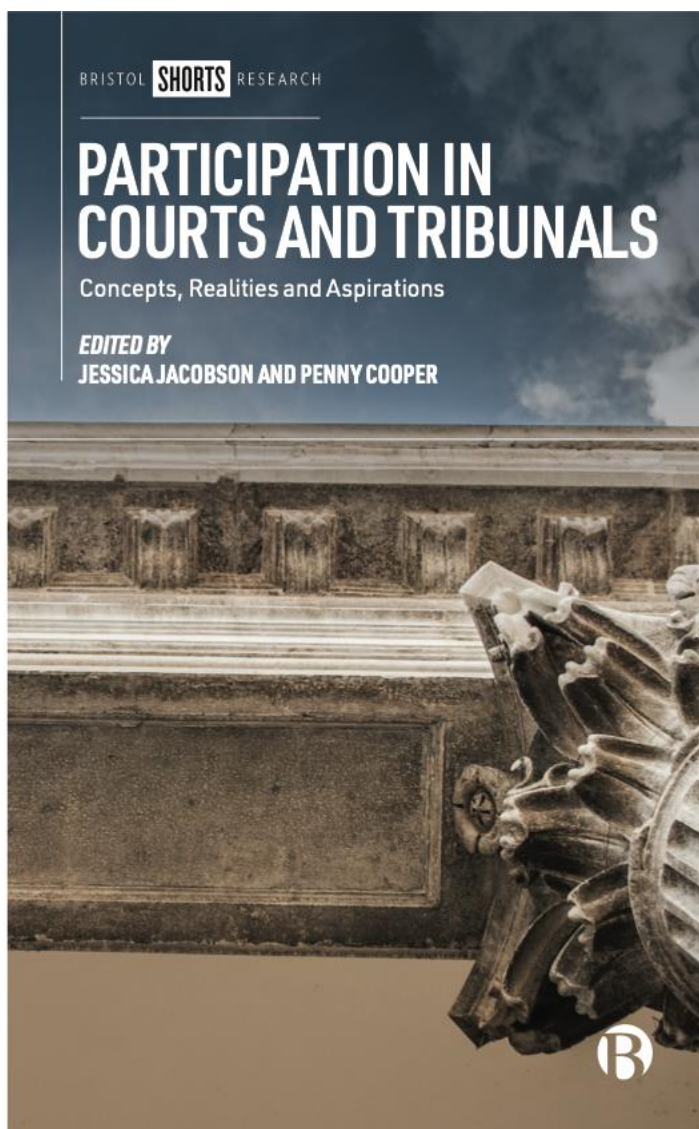
4. CONCLUSIONS AND LOOKING AHEAD

- 4.1** Case law and policy, while referring to effective participation, are largely silent on the form that participation should take or its functions. This study now offers a framework – albeit a preliminary one because further research is required with lay users.
- 4.2** The *Ten Points of Participation* should guide policy- and practice-oriented engagement with witnesses and parties so that they might better understand what to expect in court and what is expected of them. It should also form the basis of much-needed future policy development affecting and research involving lay users.
- 4.3** Research shows that ‘traditional’ hearings can be marginalising and disempowering for lay users. Remote hearings, if poorly configured, might retain the old barriers to participation and add new ones. Justice practitioners have a key role to play in ensuring lay court and tribunal user participation is as effective as possible.
- 4.4** Justice practitioners are encouraged to reflect on the *Ten Points of Participation* and use them to inform their own approach to lay user participation.

ACKNOWLEDGEMENTS AND REFERENCES

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Further details, including how to download the open-access e-book, are available [here](#).



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