

## FACULTY OF ADVOCATES

### DISCUSSION PAPER ON REMOTE COURTS

#### POST-COVID 19

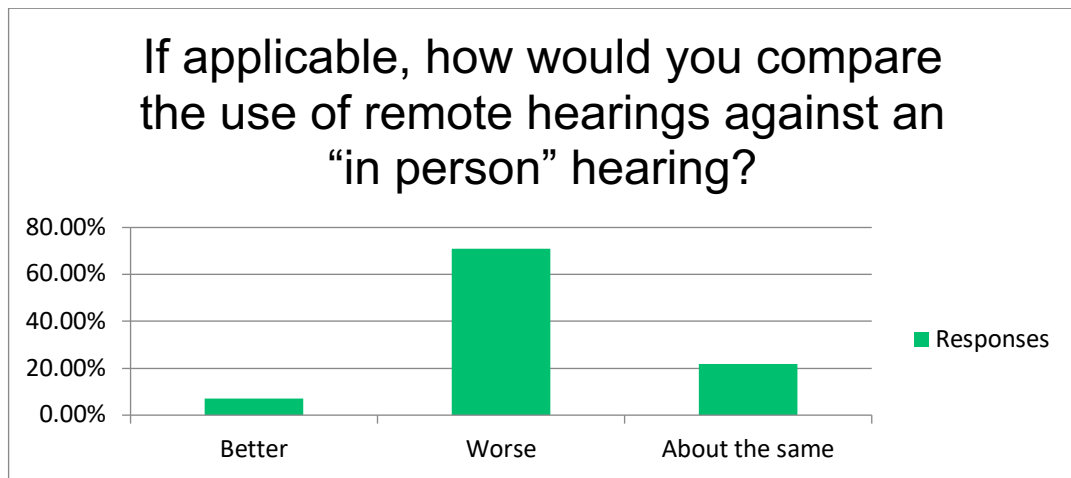
##### **Introduction**

1. Faculty of Advocates welcomes the opportunity to contribute to the discussion on remote Courts to ensure efficient and effective administration of justice. How Courts and Tribunals function, once the pandemic has passed, is of critical importance. The pandemic has demonstrated that remote working is possible in ways that many of us would not have believed. It has allowed the justice system to keep functioning and has, at least in the higher courts, avoided the build-up of serious backlogs. Indeed, in civil work, the success has been such that backlog has been avoided almost entirely. These are considerable achievements. However, Faculty considers that it is important that there is a careful appraisal of remote hearings in order that an informed assessment can be made in relation to the role that technology should play going forward.
2. Faculty recognises that technology has a role to play in modernising the justice system. The critical issue is what role technology should have to assist in widening access to justice and, in particular, instances where remote hearings may be a suitable alternative to a traditional “in person” hearing. Faculty doubts that there is a simple binary choice between remote hearings and in person hearings. Rather, an informed discussion requires to take place to assess which cases will benefit from increased use of technology.
3. Presenting the “view of Faculty” on these matters is difficult. Faculty comprises a wide range of both practitioners and practices. However, in order to gauge a broad sense of the view, we have undertaken two surveys of members on these matters. The first was undertaken in August 2020 and the second in April 2021.
4. The surveys comprised questions that allowed statistical analysis, together with room for comment. The response rate to the survey was the same, with 186 responses on each occasion. Bearing in mind that the survey sought views on civil work only, that

response rate is thought to be reasonably high. The format of this paper sticks closely to the questions asked in that survey, together with discussion of some of the issues that arise.

### General Experience of the Use of Technology

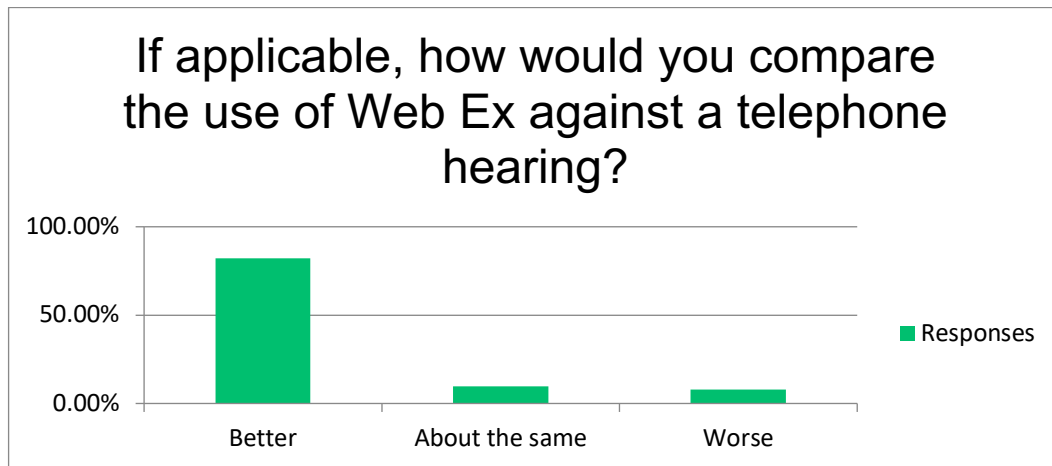
5. The percentage of members who had use of technology increased between the two surveys. For instance, in the first survey, only 40% of responders had experience of the use of WebEx for court submissions. By the time of the second survey, that had increased to 88%. For procedural hearings, the increase was from 29% to 83%; and for witnesses the increase was from 7% to 51%. As a result, views on the use of remote technology expressed in the second survey has benefitted from a greater experience of that usage.
6. When asked to compare the experience of remote technology against an “in-person” hearing, the responses have remained somewhat consistent. From the second survey, the responses were as follows:



7% of members in both surveys consider remote hearings to be “better”. Between the two surveys, the percentage that considered it to be worse decreased from 76% to 71%, with a correlative increase from 16% to 21% of those that considered the experience to be the same. This suggests a limited improvement in the perception of the use of technology, but the increase is marginal and only to the extent of perceiving the hearing as no worse than an in-person hearing.

7. As between types of remote hearing, both surveys identified a clear preference for Web-Ex as against telephone. Indeed, that proportion has increased in the second

survey, suggesting that greater experience of Web-Ex has shown it to be better than the telephone. Both the clear preference expressed by members and the increase between surveys demonstrates that telephone hearings are generally an unsatisfactory means of conducting court hearings.



8. From the comments expressed by members, there is likely to be some room for further improvement in the perception of technology with greater experience and with improvement in the stability of internet connections. Greater experience may improve some practical objections, but many of those issues are well beyond the control of the Court service. Many depend on infrastructure.
9. Some responders have drawn a distinction between procedural matters, where the issues to be addressed at the hearing are relatively uncontentious, and more substantial matters. In the latter, the feeling has been expressed that the inability to engage with the judge is detrimental to good advocacy. Responders have pointed to the difficulty in being able to pick up non-verbal cues and to difficulties in engaging with the judge. Such difficulties can be amplified when there is more than one judge. We discuss, below, some of the particular difficulties of dealing with remote hearings and witnesses.
10. There have been several comments that the experience of conducting a remote hearing is both more challenging in terms of managing the presentation, as well as more tiring than an in-person hearing.
11. In terms of benefits, members have pointed to the convenience of Web-Ex, particularly for those that would otherwise have to travel to Court. With increased convenience comes the potential for certain cost savings. For example, a party with

counsel instructed in, say, Aberdeen, could make significant savings were counsel to be instructed for procedural hearings which, with case managed procedures at least, is desirable. For reasons discussed elsewhere in this paper, however, it should not be assumed that remote hearings reduce all costs.

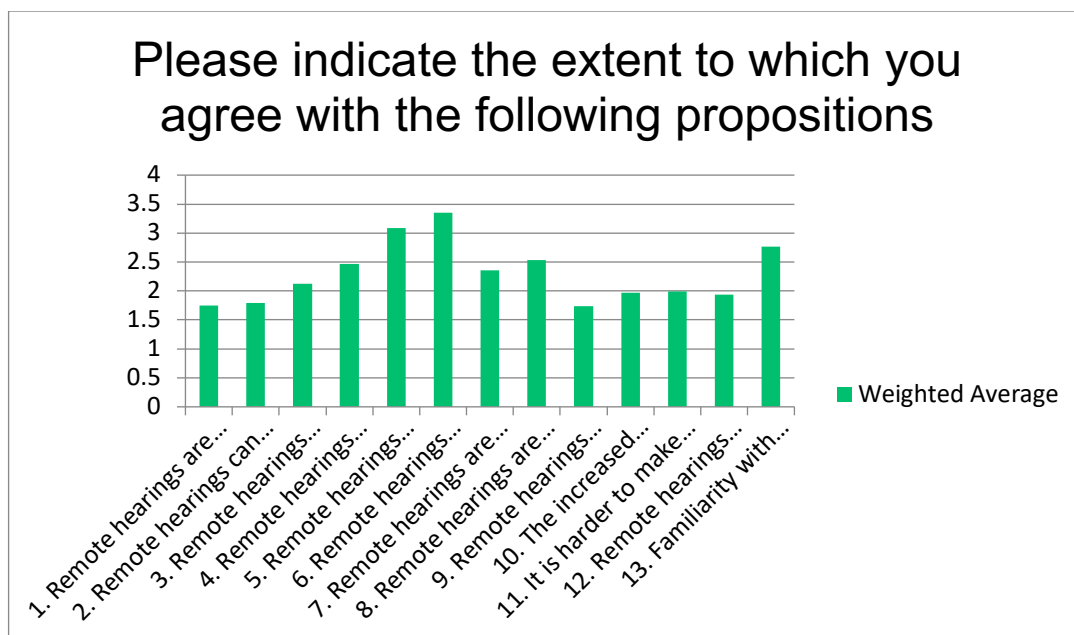
12. Another benefit has been the improvement in the Court processes regarding electronic documents. These changes have resulted in a rapid acceleration in the provision of electronic papers, rapidly reducing storage requirements and improving data security.

### **Moving Forward**

13. In an effort to try to identify patterns in the views of members about the range of options that might be open for future conduct, members were asked to respond to a number of propositions. They were:

1. Remote hearings are a useful addition to the options available for court hearings.
2. Remote hearings can reduce the cost of attendance at court.
3. Remote hearings can, if used appropriately, increase access to justice.
4. Remote hearings should be the default for procedural business.
5. Remote hearings should be the default for submissions/argument.
6. Remote hearings should be default for witness evidence in civil cases.
7. Remote hearings are more accessible for parties.
8. Remote hearings are more likely than in person hearings to be attended by members of the public.
9. Remote hearings require more written argument in advance.
10. The increased requirement for written argument leads to extra expense in a remote hearing as compared to an in-person hearing.
11. It is harder to make an argument at a remote hearing than at an in-person hearing.
12. Remote hearings should only be used in any case where the Court and parties agree.
13. Familiarity with remote hearings is consistent across all courts and tribunals.

Possible responses ranged from “Strongly Agree” (1) to “Strongly Disagree” (4). The weighted average of the responses was:



14. Notable patterns included:

- i. A combined 91% of members agreed that remote hearings are a useful addition to the options available for Court hearings. That such a high percentage of members agree that remote hearings have a part to play in court proceedings is important. It suggests that there is widespread support in the profession for utilising technology and making remote hearings work.
- ii. When comparing procedural hearings, submissions/argument and witness evidence, only procedural hearings, a combined 49.73%, came close to a majority when considering whether remote technology should be the default. Submissions/argument and witness evidence achieved combined support of 19.46% and 4.35% respectively. A combined 72% considered that remote hearings should only be used with the consent of parties. The lack of support for remote hearings being the default for extended argument or for hearings involving witness evidence is notable. It reflects the general observations above, that remote hearings by Web-Ex are viewed by the vast majority of members as being inferior to in-person hearings. However, the relative support for its use in procedural hearings, combined with the view that parties could consent to the use of a remote hearings leaves ample room for development. We return to this, below.

- iii. **Access to Justice.** A combined 61% agreed that remote hearings could, if used appropriately, increase access to justice. However, a combined 52% considered that remote hearings were less accessible for parties and a combined 64% considered that remote hearings were less accessible for members of the public. A combined 73% considered that familiarity with remote business was consistent across all courts and tribunals. Though perhaps counter-intuitive, this set of responses was not surprising. We say more about it below.
- iv. **Cost.** A combined 81% considered that a remote hearing required more written advocacy in advance. A combined 62% considered that the increased need for written advocacy in advance of a remote hearing led to additional cost, though responders recognised (a combined 75%) that the cost of attendance at court was lower for a remote hearing. Again, this result is not surprising. It has been our experience that, in order to make good use of remote hearings, a greater amount of written advocacy is required. Without it, remote hearings tend to become difficult to manage. The time taken to prepare focussed written submissions will, it seems to us, inevitably lead to increases in cost.

### **Access to Justice**

- 15. The issue of access to justice is a critical part of the discussion on remote hearings and the role they should have after the pandemic. Faculty therefore considers that the responses on access to justice require careful consideration in order to contribute to the debate. Access to justice, as we see it, comprises two distinct considerations: firstly, there is the principle of open justice; and secondly, there is the right of the individual to have their dispute determined fairly, effectively, at a reasonable cost and within a reasonable timeframe.

### *Open Justice*

- 16. The starting point is, of course, that justice should be undertaken in the open.

*“[23] It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy. As Toulson LJ explained in R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court (para*

*1), society depends on the courts to act as guardians of the rule of law. Sed quis custodiet ipsos custodes ? Who is to guard the guardians? In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny.”*

(*A v BBC* 2014 SC (UKSC) 151, per Lord Reed)

17. Whether a hearing is public or not is a question of fact and degree, requiring regard to the whole circumstances (*R v Denbigh Justices ex p Williams* [1974] QB 759).
18. The importance of open justice cannot be overstated. As has been recognised by the highest courts in the United Kingdom, open justice protects the rights of those involved in court proceedings by enabling the proper scrutiny of those proceedings. It fosters public understanding of the workings of the justice system on a day-to-day basis. It inhibits uninformed and inaccurate reporting of legal proceedings (or, at the least, provides a platform to correct inaccurate reporting). It is also thought that a witness may be less likely to embellish their testimony in the knowledge that journalists and members of the public are viewing, and scrutinising, what is being said in court. In short, it is important to emphasise that open justice is not a jurisprudential concept of little practical significance. On the contrary, it continues to play a vital role in the proper administration of justice at a practical level.
19. Under present circumstances, there can be little doubt that the pandemic is sufficient circumstance to require the current system, whereby legal representatives are sent web links to conduct a hearing and whereby journalists and parties have to ask for such links as are available, if they want to attend.
20. Post-pandemic, the balance is a lot less clear. Where courts are held in public buildings, there is no need for a member of the public to know which case they wish to attend. Indeed, members of the public are to be found freely touring Parliament House on any court day. They often stop members in the hall and ask what court hearings may be on. It is not infrequent that members of Faculty are to be seen showing members of the public the court rolls and pointing them in the direction of a court that might be sitting. The experience of members of the public coming into Court for 15 minutes or so, to observe proceedings, will be familiar to all.
21. Of course, to a significant extent, the public scrutiny of court proceedings has to be undertaken by journalists. Again, however, pre-pandemic an interested reporter could

- walk into any court and see for themselves whether what was happening was newsworthy. Their ability to do so is not nearly so obvious under the current system.
22. A system that requires a party, in advance, to contact the Court in order to obtain a link, seems to us to be open to criticism that it is not truly open justice. Moreover, as we understand it, a member of the public who makes such an inquiry is likely to be sent a telephone link to listen to proceedings, rather than a video link by which to view those proceedings. Whether a telephone link constitutes proper access to the proceedings must be open to discussion.
  23. While a matter for IT experts, the IT infrastructure required to provide a truly open court system is likely to be well in excess of what is in place under the present circumstance. It would, it seems to us, require a system where proceedings could be observed live by clicking through from a link in the Court's website.
  24. We have considered the experience in England and Wales regarding access to justice and open justice.
  25. In England and Wales, as in Scotland, efforts have been made to facilitate the continuity of open justice. Journalists have been permitted to attend hearings remotely upon request. Members of the public may also be given permission to attend. Requests must be made in advance to allow for inclusion during the hearing set up. The facilities are not available for criminal jury trials in the Crown Court.<sup>1</sup>
  26. Whether the system ensures that justice remains open, however, is necessarily a question of anecdote. Much of the anecdotal evidence derives from the experiences of journalists and other persons who have attempted to access the courts during the pandemic. Users' experiences have been mixed.
  27. A survey in England and Wales was conducted by The Legal Education Foundation and the results were published in May 2020.<sup>2</sup> Seventeen responses were submitted to the survey by journalists and court reporters, two responses were submitted by researchers and two were submitted by members of the public. Additional responses were also submitted by press associations, individuals working at the Incorporated

---

<sup>1</sup> <https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak>

<sup>2</sup> <https://research.thelegaleducationfoundation.org/wp-content/uploads/2020/06/FINAL-REPORT-CJC-4-June-2020-v2.pdf> [accessed: 13 April 2021], section 7.



Council of Law Reporting for England and Wales and the Royal Courts of Justice, and an NGO.

28. Positive aspects of the system noted by respondents were that journalists were able to attend hearings upon request. One respondent to the survey identified being able to cover more than one hearing if cases are heard over different technological platforms. Judges and lawyers were also praised for adapting their communication style and pace to enable accurate reporting of proceedings. While there is no doubt, during the pandemic, that these measures have assisted in facilitating open justice, it is open for discussion whether they improve on the current system. We observe that access to courts, attendance at various hearings to ascertain what is newsworthy (by floating in between courts) and clear communication are all features of in-person hearings. Putting the pandemic to one side, on one view it is difficult to understand how the use of technology has actually improved the pre-existing system or provided a previously unobtainable benefit which is conducive to open justice.
29. A number of respondents to the survey identified areas where improvement was required. Problems included variation between courts in the way that guidance was adhered to, having to rely on court staff (who were understandably busy ensuring that the hearings were ready to call) to timeously provide details for joining hearings and problems with the lack of detail contained on court listings (it being unclear from the listing whether a case was newsworthy). Of particular concern were reports that members of the public were being excluded from hearings. There were also problems identified in relation to technology not working (or working poorly, making proceedings difficult to follow) and journalists and court reporters experiencing difficulties in accessing court documents (which were considered vital to accurate reporting).
30. Although a measure of success has therefore been reported by some in that they have been able to observe proceedings remotely, that is not a universal outcome. A distinction appears to fall to be drawn between open justice in theory and open justice in practice. The practice is not altogether reflective of the theory: access to hearings is not the same as attendance at hearings. That has important implications for the safeguards provided by open justice. It is also important to observe that if experienced court reporters are encountering issues, members of the public will be at a greater

disadvantage. In particular, requiring permission to attend hearings may very well act as *de facto* barrier to open justice. The person on the Clapham omnibus is far less likely to know how to request access. Moreover, questions also arise in relation to whether members of the public will have the necessary technology required to access hearings.

31. One of the most concerning aspects of the system which has been implemented are reports of court reporters and members of the public being unaware that certain cases have been calling or the significance of the cases on the listings. This has significant implications for the safeguards provided by open justice. A stark example of the erosion of the safeguards is seen in the purported conviction of Marie Dinou under the Coronavirus Act 2020, Sch. 21. Ms Dinou was fined £660 for being outside her home without a reasonable excuse. It subsequently transpired, however, that Ms Dinou had committed no crime under the Act and the conviction was quashed. Although the case was significant, the press was unaware it was taking place as there was no indication from the listings that the first coronavirus prosecution was to be heard. The error was only identified when journalists were alerted to the case by a police press release. The press release prompted a journalist at The Times to investigate the conviction further (at which point the flaws in the purported conviction were identified). This was brought to light by The Times.<sup>3</sup> The Crown Prosecution Service has since launched a review to re-examine every charge, conviction and sentence brought under the 2020 Act. Several cases are being re-listed so they can be overturned after being found to have been incorrectly prosecuted.<sup>4</sup> The case of Marie Dinou serves as an important reminder of the importance of – and practical safeguards provided by – open justice. “Who guards the guards?” is not simply a jurisprudential question of little practical importance.

32. There is another integral aspect of open justice which appears to have been largely overlooked in the arrangements which have been made: public interest in the workings of the courts extends beyond court hearings. Although, in England, the Lord Chief Justice has written that “*the requirement for open justice is generally satisfied by journalists being admitted*”,<sup>5</sup> whether that is correct is open for discussion. What a

---

<sup>3</sup> <https://www.thetimes.co.uk/article/police-fine-woman-660-for-breaching-coronavirus-lockdown-laws-at-train-station-5ftr9ql0f> [accessed: 13 April 2021]

<sup>4</sup> <https://www.thetimes.co.uk/article/cps-will-review-every-charge-under-coronavirus-law-0l37rsg8f> [accessed: 13 April 2021]

<sup>5</sup> <https://committees.parliament.uk/publications/1528/documents/13965/default/> [accessed: 13 April 2021]

member of the public may regard as important may not be deemed newsworthy by a journalist. On that hypothesis, there is a risk that open justice is confined to newsworthy cases. As has been outlined above, it is not uncommon for members of the public to sit in Parliament Hall and observe counsel and solicitors at work before cases call in court. As was highlighted by the Faculty's Director of Education and Training: *"the very buildings of the Court of Session and High Courts are essential engines of learning, compromise and discussion... Cases are settled. Issues are focused. Ideas are shared."*<sup>6</sup> Justice extends beyond the court room and that is recognised by members of the public. This aspect of the current system, however, has been lost during the pandemic. It is crucial that all aspects of open justice are observed: not just those aspects which are of interest to journalists. If remote hearings become the norm, it is difficult to envisage a system which would facilitate this integral part of open justice.

33. While open justice requires to be safeguarded, remote hearings also bring with them the scope for abuse by members of the public. There are concerns that a judge in a virtual court is unable to control unlawful recording or broadcasting of proceedings, or other abuse by members of the public. It is much easier to prevent the unauthorised recording of proceedings during the course of in-person hearings. Concerns about abuse, however, in our view, should not be cited as a reason for excluding members of the public from hearings (which, in England, it appears to have been<sup>7</sup>) given that justice should be open to, and accessible by, all.
34. While there is room for technology to bolster open justice, post-pandemic it is perhaps better viewed as complementary rather than customary. For example, in the Supreme Court proceedings are livestreamed. Members of the public and journalists, however, are still able to attend hearings in person (and they do). That way, the potential benefits of technology (for example, the ability to view proceedings from another location) are realised while ensuring that the safeguards guaranteed by in-person hearings are retained. That way, technology does not act as a *de facto* barrier to open justice.

---

<sup>6</sup> [https://twitter.com/nrm\\_advocate/status/1058701241784635394](https://twitter.com/nrm_advocate/status/1058701241784635394) [accessed: 13 April 2021]

<sup>7</sup> See footnote 5, above.

### *Access by the individual*

35. In some respects, the use of remote hearings is likely to make little difference to the individual seeking to have their dispute resolved. For instance, it is difficult to see that extensive use of remote hearings will confer any benefit in terms of the time to resolution of disputes. The time taken to have a dispute heard is much more dependent on availability of judges than it is on the type of hearing.
36. In other respects, the impact on the individual is potentially adverse. For litigants who are not technologically literate, or who are from more disadvantaged backgrounds and who therefore do not have access to technology, it may be more difficult to participate effectively in a remote hearing than an in-person hearing.
37. In yet further respects, the impact on the individual is poorly understood. For instance, as we discuss elsewhere, the experience disclosed in our survey is that the additional requirement for written advocacy means that a remote hearing can be more costly than an in-person hearing. Equally, we are unaware of any study of whether remote hearings undertaken during COVID have reduced the trust that litigants. Bearing in mind that principle that a change to remote hearings should be positively justified before it is made, investigating these poorly understood aspects could be of critical importance.

### **Witnesses and remote hearings**

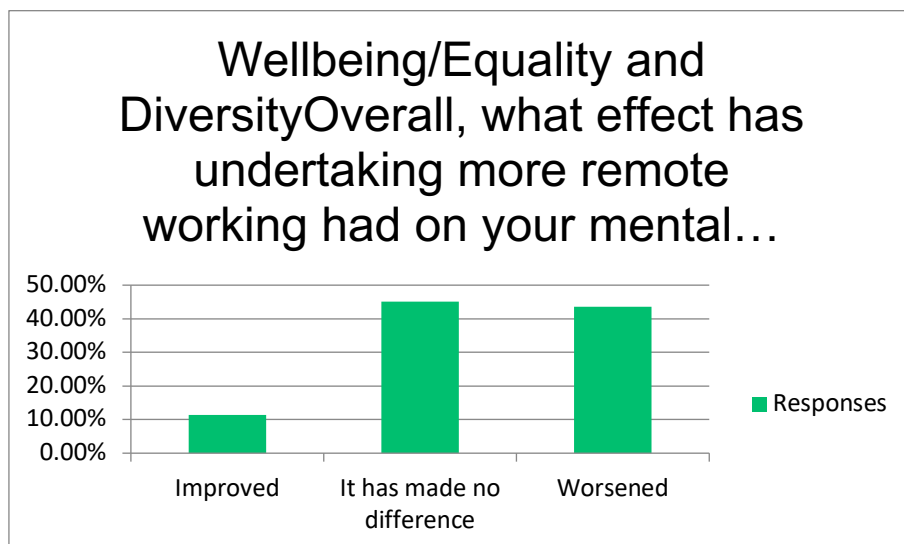
38. As has been noted, there was a very low level of support for remote hearings where witnesses have been involved. Members have experienced witness evidence both by Web-Ex and by telephone. Taking witness evidence by remote means raises a number of difficulties for practitioners and for courts. Even assuming that the technology works flawlessly and that the witness has sufficient technical ability to participate (both of which we comment upon elsewhere) difficulties remain.
39. It has been our experience that testing witness evidence remotely has been less than satisfactory. Firstly, there are practical difficulties. For instance, when witnesses have to be shown a production, there can be difficulty, even when screen sharing is in use. Furthermore, to avoid technical glitches, the practice has been to send productions to witnesses. That practice, whilst understandable, raises a number of issues regarding

the access to information and the documentation available to the witness. All of this has to be managed with the witness remote from the presiding judge, who would normally be able to observe and manage them.

40. Secondly, there are real evidential difficulties. The ability to object to evidence in a remote hearing is significantly affected. Delays on the line and the difficulty of people unavoidably speaking over each other mean that evidence can either be out before a valid objection is heard, or is not heard and requires to be repeated. These difficulties do not arise in in-person hearings.
41. Thirdly, there are less tangible difficulties. It is not clear whether witnesses treat giving evidence remotely in the same way they treat an attendance in person. Whilst these issues will often be sensitive to the particular witness, there is no baseline, based on experience as to how witnesses react to the situation.
42. Finally, there has been a tendency, because of the increased breaks required for the conduct of a case remotely, for witnesses to take longer giving their evidence.

### **Wellbeing and Equality & Diversity**

43. For the Faculty's second survey, we decided to survey the wellbeing effects of remote working. Members were asked what effect increased remote working had on their mental health. The responses were as follows:



Whilst the greatest number of responses indicated that it made no difference, that was very closely followed by those saying it had worsened. From the perspective of the relevant professional body, that statistic is of significant concern. The Faculty has

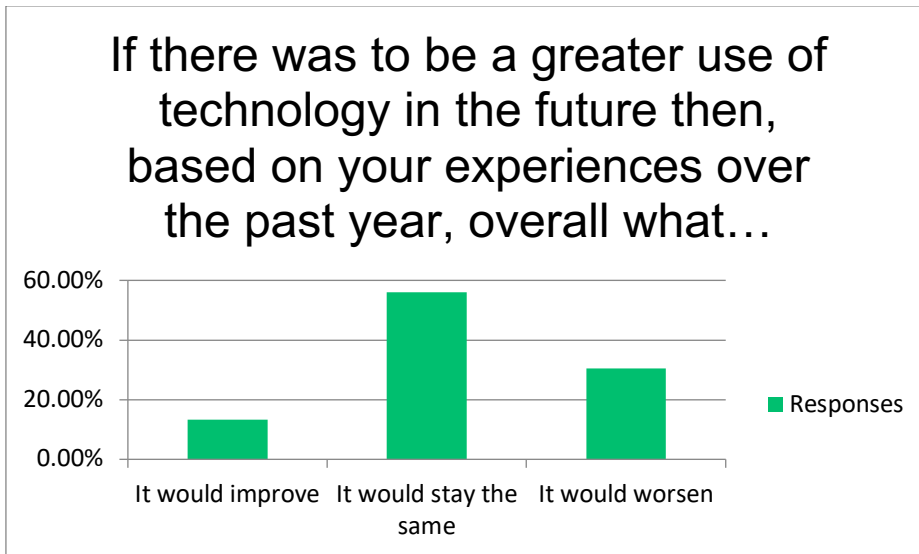
sought to provide support for its members' mental health. There is of course always room for improvement in that support and Faculty will consider how best to deal with this. There is a strong possibility, of course, that much of the adverse effect will be due to health restrictions, rather than simply due to work being undertaken remotely. However, the overall sense of remoteness causing problems with mental health ought not to be surprising. At its base, the practice of litigation remains about people.

44. The comments from members on this topic pointed out the support that is gained through working in Parliament House and within the collegiate spirit Faculty engenders. This aspect has been of particular concern for very junior members (i.e. first 2-3 years of practise) and devils. At an early stage, the support provided by colleagues is paramount.

#### **Access to the profession.**

45. Silent casualties of COVID are the "devils" or trainee advocates and very junior Members. This year's devils have had little opportunity to be in the Advocates Library, and some have not visited it at all. The opportunity to view proceedings in court has been irregular and challenging. The devils have never met as a whole group in person. While it is possible to provide remote training that imparts knowledge and allows them to obtain some experience, equally vital elements have been largely (if not entirely) absent: collegiality, attitudinal and informal learning. Collegiality is vital for wellbeing, advice, support, and sound ethical behaviour; collegiality cannot be replicated digitally. Attitudinal learning is the individual effect and expression of collegiality: advocates do not magically appear; rather, they develop a mixture of both individual talent and sense of duty necessary for the public office they hold. Informal learning is barely visible; rather like gravity, informal learning is most notable when it is absent. Ideas, knowledge, experience, an understanding of unwritten rules and practice, an understanding of people and their behaviour, whom to ask for help (and when), are in large part learned informally. It remains to be seen what the lasting effects of remote learning will be on the "Covid generation" of devils.

46. Trying to project forward the impact were the changes to remain in place post-pandemic, members were asked whether if there was a greater use of technology, what effect would it have on their mental health. The response was:



These results indicate that members appreciate that some current adverse effects are due to health restrictions. It is notable however, that approximately 30% of members consider that continued use of remote working will worsen their mental health. The prediction that mental health would worsen likely takes account that 42% of members have seen their workload increase due to remote working, compared to only 14% who said it had decreased.

### **The justification for remote working post-COVID**

47. At present, the justification for remote working is the pandemic. When that justification no longer exists, what is the justification for continuing to work remotely? Our view is that the principle by which that question should be answered is that change should be made only where it improves the delivery of justice as a whole. Technology should not, in our view, become the default simply because it exists. Where an improved system is achieved by justice in person, that should be provided.

48. In order to assess the benefit of change, it is necessary to take account of the views of litigants as well as members of the professions. It has not proved possible for the Faculty to survey the views of litigants as to their experience of Court. Other organisations may be able to do so. Anecdotally however, we are aware that for some litigants, the depersonalisation of the process by use of remote technology leads to a

diminished experience. This may be of particular importance to party-litigants, who may already have a diminished view of the justice system. We are also aware that many participants in the justice system, be they party litigants or witnesses, may simply not have the facilities or experience to participate remotely.

### **Points for Discussion**

49. Taking account of the foregoing, and considering the three topics under consideration at the conference, Faculty's suggestions for discussion are as follows:

### **Procedural Hearings and Debates**

50. Based on the responses and based on our own thinking, this area seems likely to benefit most from the use of remote technology. Indeed, for uncontentious procedural business, there is an argument that remote hearings should be the default. We do, however, see a significant distinction between basic procedural business on the one hand and debates on the other. Courts generally only allow debate when there is a substantial question of law to address. That being the case, they have more in common with appeals than they do with procedural business, designed to advance the progress of an action. For that reason, we take the view they ought to be considered separately and on their own merit.
51. Points for discussion include the following:
- i. Should remote hearings be the default position for procedural business or should it be a matter purely for the procedural judge to determine the appropriate format for such a hearing?
  - ii. Should parties have a means by which, if they agree that the issues are such that a remote hearing is not suitable, they can indicate that view to the Court? If so, what should be the test to be applied by the Court?
  - iii. Should the view of parties (as distinct from their representatives) be taken into account when determining the forum for any hearing? If, for example, a litigant would have much more faith in an in person hearing, how is that to be catered for?
  - iv. Debates should be treated differently from procedural hearings. Under what conditions would it be suitable to undertake a procedure roll debate by Web-



Ex? Would such a move have a consequent increase in the cost of such hearings?

### **Proofs**

52. Remote hearings involving witnesses have a very low level of support. Indeed, where only 4% of the profession support holding these hearings by remote technology, it seems impossible to conclude that holding proofs by Web-Ex would be an improvement in the system of justice.
53. Of course, this is an area where the use of technology does not have to be binary. The default position could be that proofs are to be held in person, but that the technology could be available for certain witnesses. Examples cited by members have included vulnerable witnesses and certain experts although contrary views were also expressed.
54. The points for discussion include:
- i. Under what circumstances is the taking of evidence improved by using remote technology?
  - ii. What safeguards are required when evidence is being taken by using remote technology?
  - iii. How, from a procedural perspective, ought such issues to be addressed? Should this be a matter to be addressed in procedural hearings and, if so, what test ought the Court to apply when considering the issue?

### **Appeals and Reclaiming Motions**

55. As a form of submissions, this raises many of the same issues as debates. However, conducting hearings with more than one judge, it has been notable that it seems to be more difficult for judges to participate in the same type of discourse as can be undertaken in Court. From an advocate's perspective, that type of discourse, whilst at times challenging, is of immense importance to the proper development of an argument.

# **FACULTY OF ADVOCATES**

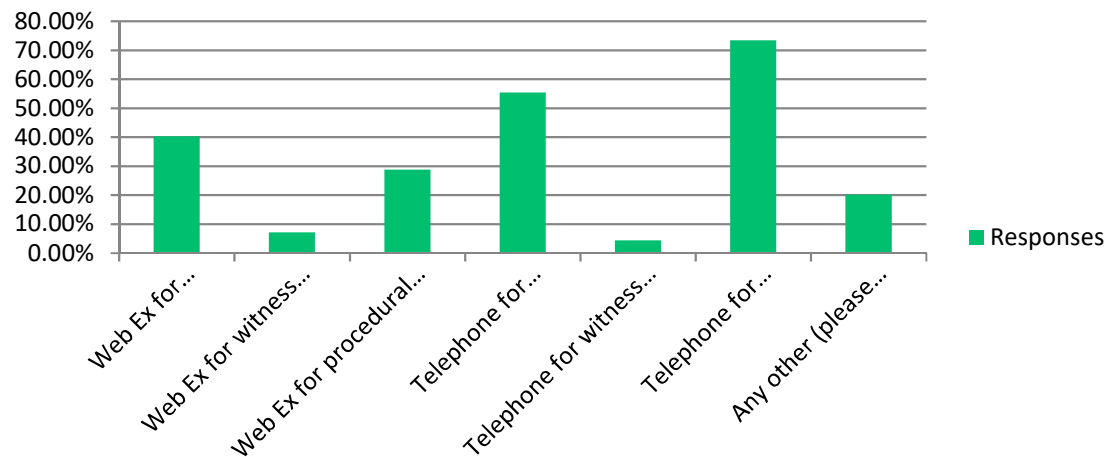
**Remote Courts Survey August 2020**

## Remote Courts

### What experience have you had in the use of remote technology to conduct court

Answer Choices	Responses	
Web Ex for submissions/argument	40.22%	74
Web Ex for witness evidence	7.07%	13
Web Ex for procedural hearings	28.80%	53
Telephone for submissions/argument	55.43%	102
Telephone for witness evidence	4.35%	8
Telephone for procedural hearings	73.37%	135
Any other (please provide details)	20.11%	37
	<b>Answered</b>	<b>184</b>
	<b>Skipped</b>	<b>2</b>

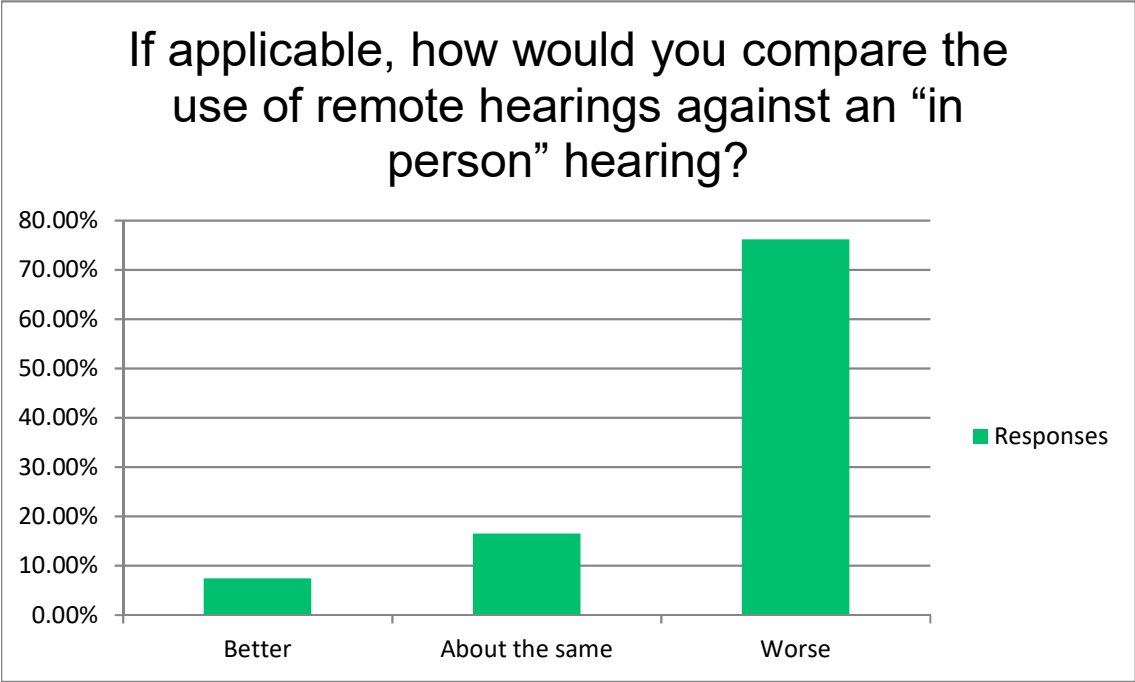
What experience have you had in the use of remote technology to conduct court hearings? Please tick all relevant boxes.



### Remote Courts

If applicable, how would you compare the use of remote hearings against an “in person” hearing?

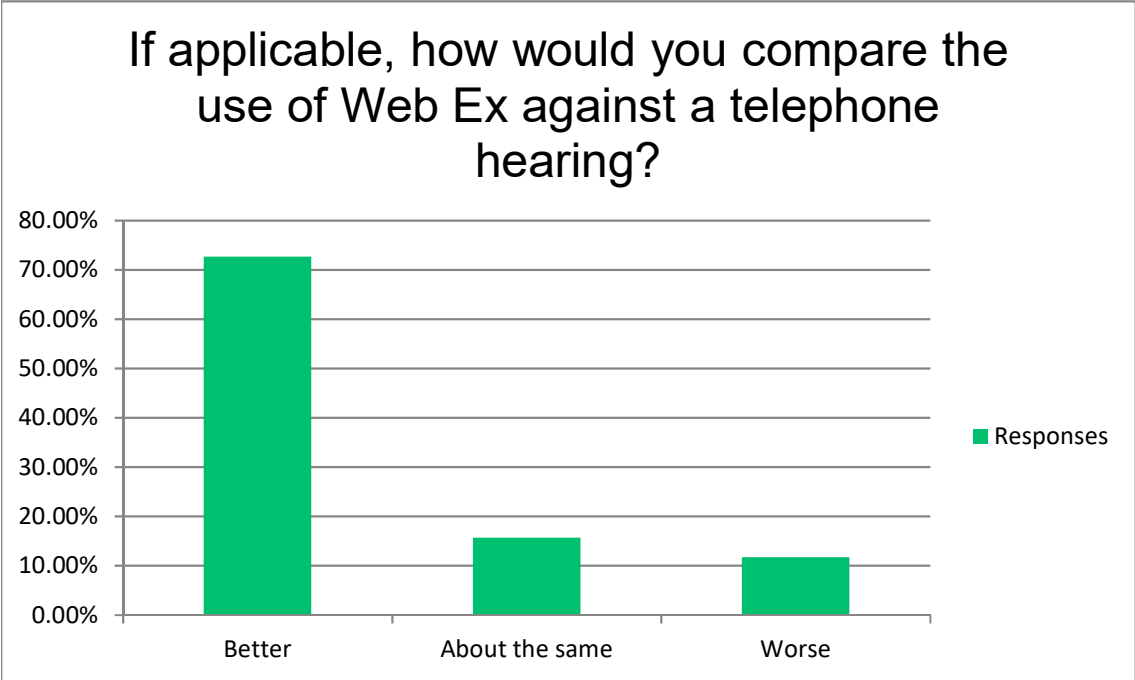
Answer Choices	Responses	
Better	7.39%	13
About the same	16.48%	29
Worse	76.14%	134
Explain		162
<b>Answered</b>		<b>176</b>
<b>Skipped</b>		<b>10</b>



### Remote Courts

If applicable, how would you compare the use of Web Ex against a telephone hearing?

Answer Choices	Responses	
Better	72.66%	93
About the same	15.63%	20
Worse	11.72%	15
Explain		136
<b>Answered</b>		<b>128</b>
<b>Skipped</b>		<b>58</b>



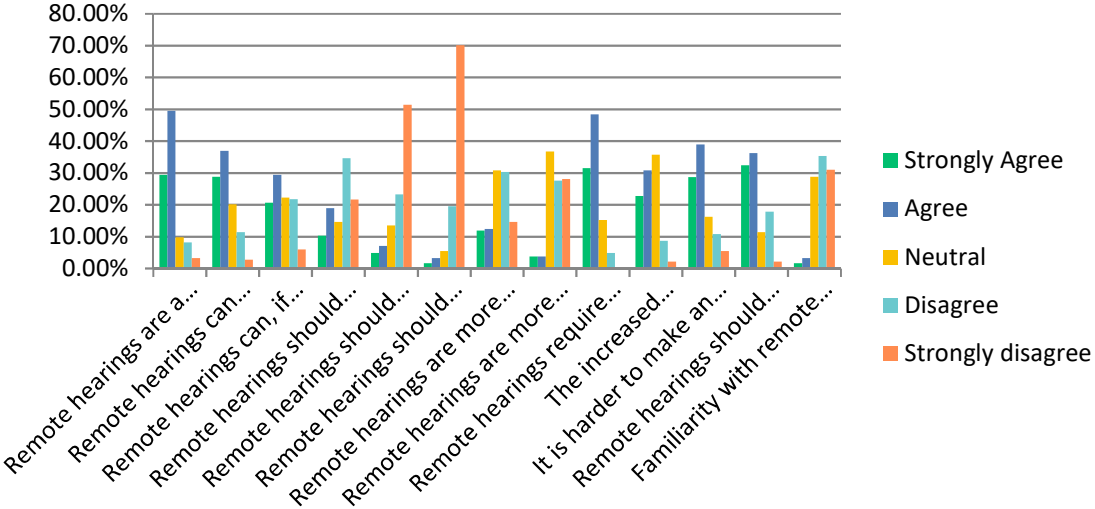
Remote Courts August 2020

Remote Courts

Please indicate the extent to which you agree with the following propositions.

	Strongly Agree		Agree		Neutral		Disagree		Strongly disagree		Total
Remote hearings are a useful addition to the options available for court hearings.	29.35%	54	49.46%	91	9.78%	18	8.15%	15	3.26%	6	184
Remote hearings can reduce the cost of attendance at court.	28.80%	53	36.96%	68	20.11%	37	11.41%	21	2.72%	5	184
Remote hearings can, if used appropriately, increase access to justice.	20.65%	38	29.35%	54	22.28%	41	21.74%	40	5.98%	11	184
Remote hearings should be the default for procedural business.	10.27%	19	18.92%	35	14.59%	27	34.59%	64	21.62%	40	185
Remote hearings should be the default for submissions/argument.	4.86%	9	7.03%	13	13.51%	25	23.24%	43	51.35%	95	185
Remote hearings should be default for witness evidence in civil cases.	1.63%	3	3.26%	6	5.43%	10	19.57%	36	70.11%	129	184
Remote hearings are more accessible for parties.	11.89%	22	12.43%	23	30.81%	57	30.27%	56	14.59%	27	185
Remote hearings are more likely than in person hearings to be attended by members of the public.	3.78%	7	3.78%	7	36.76%	68	27.57%	51	28.11%	52	185
Remote hearings require more written argument in advance.	31.52%	58	48.37%	89	15.22%	28	4.89%	9	0.00%	0	184
The increased requirement for written argument leads to extra expense in a remote hearing as compared to an in person hearing.	22.70%	42	30.81%	57	35.68%	66	8.65%	16	2.16%	4	185
It is harder to make an argument at a remote hearing than at an in person hearing.	28.65%	53	38.92%	72	16.22%	30	10.81%	20	5.41%	10	185
Remote hearings should only be used in any case where the Court and parties agree.	32.43%	60	36.22%	67	11.35%	21	17.84%	33	2.16%	4	185
Familiarity with remote hearings is consistent across all courts and tribunals.	1.63%	3	3.26%	6	28.80%	53	35.33%	65	30.98%	57	184
										<b>Answered</b>	<b>185</b>
										<b>Skipped</b>	<b>1</b>

Please indicate the extent to which you agree with the following propositions.



# **FACULTY OF ADVOCATES**

**Covid Remote Working Post-pandemic Survey**

**April 2021**

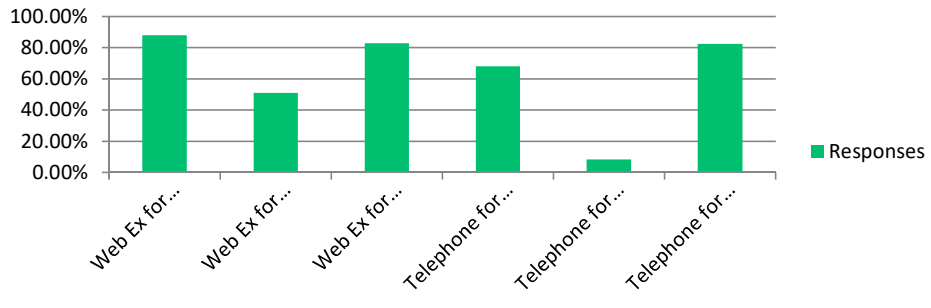


Covid: Remote working post-pandemic

**General Use of Technology**What experience have you had in the use of remote technology to conduct court or tribunal hearings? Please tick all relevant boxes.

Answer Choices	Responses	
Web Ex for submissions/argument	87.91%	160
Web Ex for witness evidence	51.10%	93
Web Ex for procedural hearings	82.97%	151
Telephone for submissions/argument	68.13%	124
Telephone for witness evidence	8.24%	15
Telephone for procedural hearings	82.42%	150
Other (please specify)		19
	<b>Answered</b>	<b>182</b>
	<b>Skipped</b>	<b>4</b>

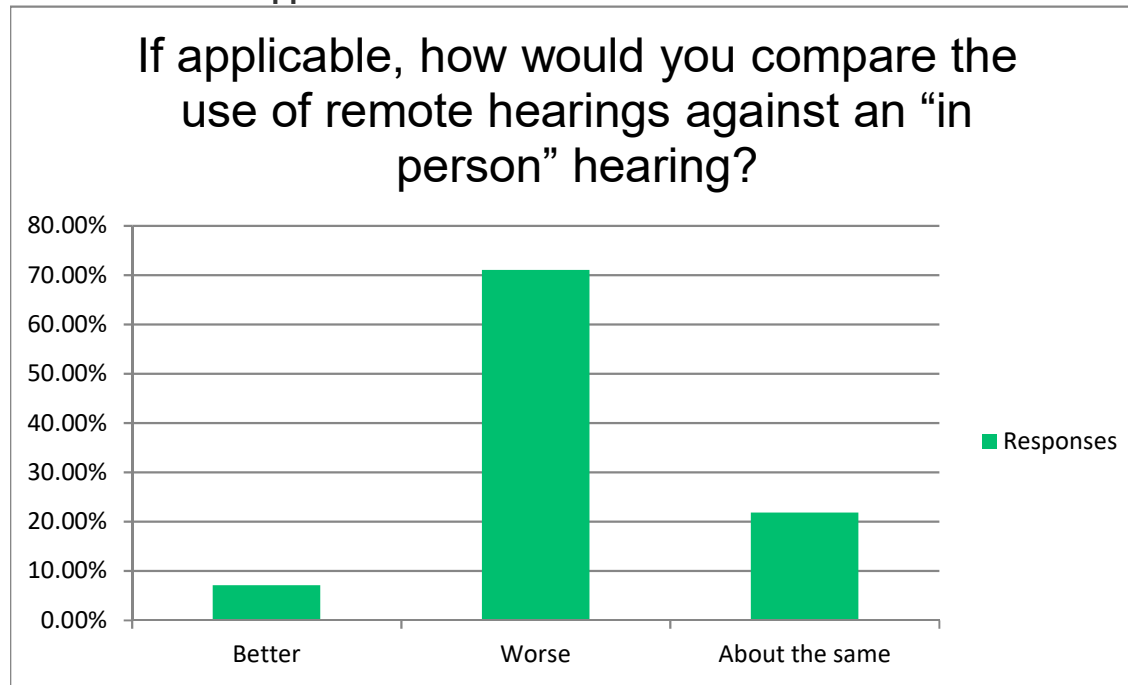
General Use of Technology  
 What experience have you had in the use of remote technology to conduct court or tribunal hearings? Please tick all relevant boxes.



### Covid: Remote working post-pandemic

If applicable, how would you compare the use of remote hearings against an “in person” hearing?

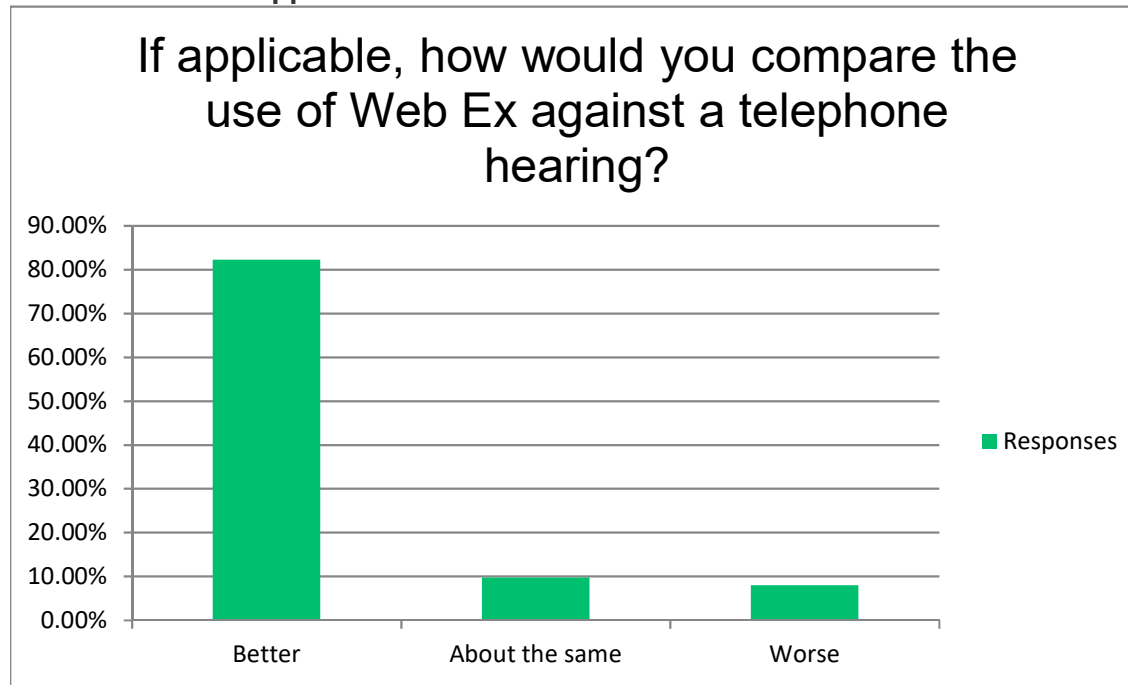
Answer Choices	Responses	
Better	7.10%	13
Worse	71.04%	130
About the same	21.86%	40
<b>Answered</b>		<b>183</b>
<b>Skipped</b>		<b>3</b>



### Covid: Remote working post-pandemic

If applicable, how would you compare the use of Web Ex against a telephone hearing?

Answer Choices	Responses	
Better	82.29%	144
About the same	9.71%	17
Worse	8.00%	14
	<b>Answered</b>	<b>175</b>
	<b>Skipped</b>	<b>11</b>

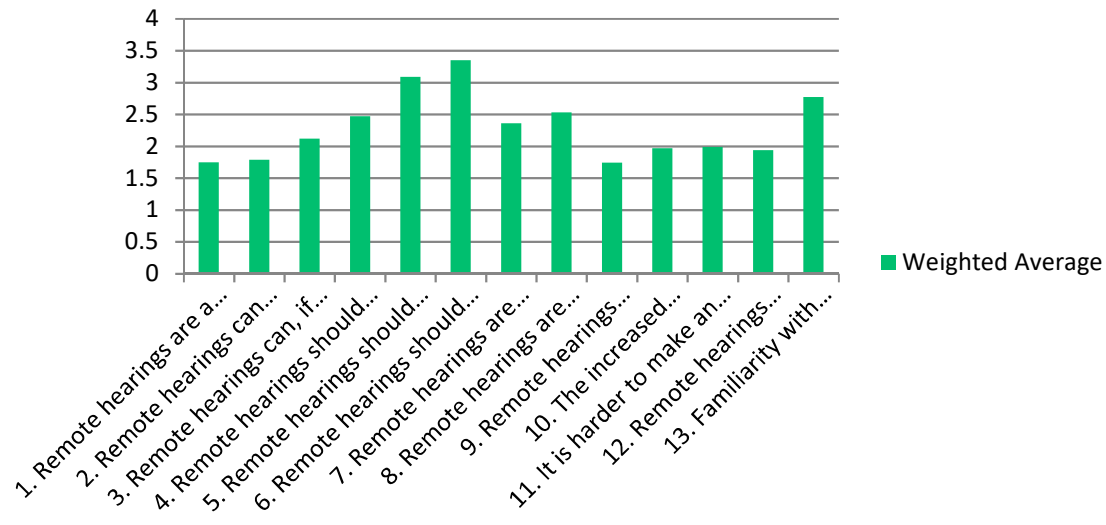


## Covid: Remote working post-pandemic

Please indicate the extent to which you agree with the following propositions

	Strongly Agree		Agree		Disagree		Strongly Disagree		N/A		Total	Weighted Average
1. Remote hearings are a useful addition to the options available for court hearings.	36.22%	67	55.14%	102	5.95%	11	2.70%	5	0.00%	0	185	1.75
2. Remote hearings can reduce the cost of attendance at court.	30.43%	56	44.57%	82	14.13%	26	4.35%	8	6.52%	12	184	1.79
3. Remote hearings can, if used appropriately, increase access to justice.	20.00%	37	40.54%	75	24.86%	46	9.19%	17	5.41%	10	185	2.12
4. Remote hearings should be the default for procedural business.	16.22%	30	33.51%	62	32.97%	61	16.22%	30	1.08%	2	185	2.47
5. Remote hearings should be the default for submissions/argument.	7.03%	13	12.43%	23	36.22%	67	42.16%	78	2.16%	4	185	3.09
6. Remote hearings should be default for witness evidence in civil cases.	2.72%	5	1.63%	3	22.83%	42	65.22%	120	7.61%	14	184	3.35
7. Remote hearings are more accessible for parties.	11.96%	22	28.26%	52	40.76%	75	11.41%	21	7.61%	14	184	2.36
8. Remote hearings are more likely than in person hearings to be attended by members of the public.	5.98%	11	13.04%	24	33.15%	61	30.43%	56	17.39%	32	184	2.53
9. Remote hearings require more written argument in advance.	31.52%	58	49.46%	91	12.50%	23	1.63%	3	4.89%	9	184	1.74
10. The increased requirement for written argument leads to extra expense in a remote hearing as compared to an in-person hearing.	21.62%	40	40.54%	75	26.49%	49	3.78%	7	7.57%	14	185	1.97
11. It is harder to make an argument at a remote hearing than at an in-person hearing.	27.57%	51	42.70%	79	23.78%	44	3.78%	7	2.16%	4	185	1.99
12. Remote hearings should only be used in any case where the Court and parties agree.	31.89%	59	40.54%	75	20.54%	38	4.86%	9	2.16%	4	185	1.94
13. Familiarity with remote hearings is consistent across all courts and tribunals.	1.08%	2	11.89%	22	40.00%	74	32.97%	61	14.05%	26	185	2.77
											<b>Answered</b>	<b>185</b>
											<b>Skipped</b>	<b>1</b>

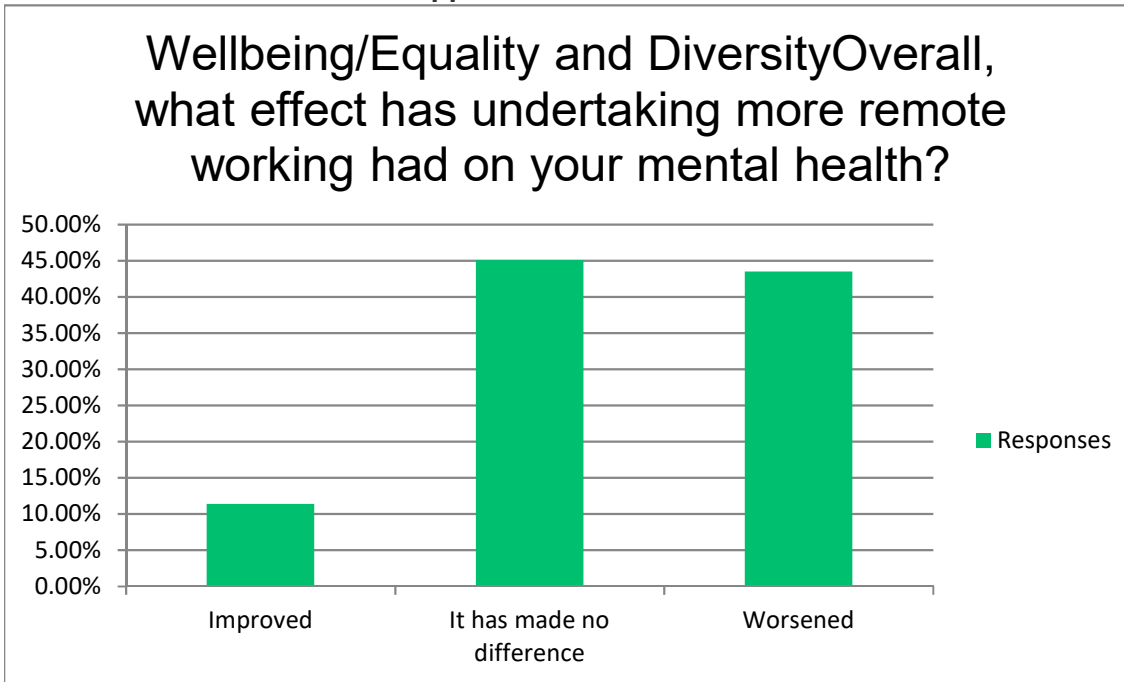
Please indicate the extent to which you agree with the following propositions



### Covid: Remote working post-pandemic

### Wellbeing/Equality and Diversity Overall, what effect has undertaking more remote working had on your mental health?

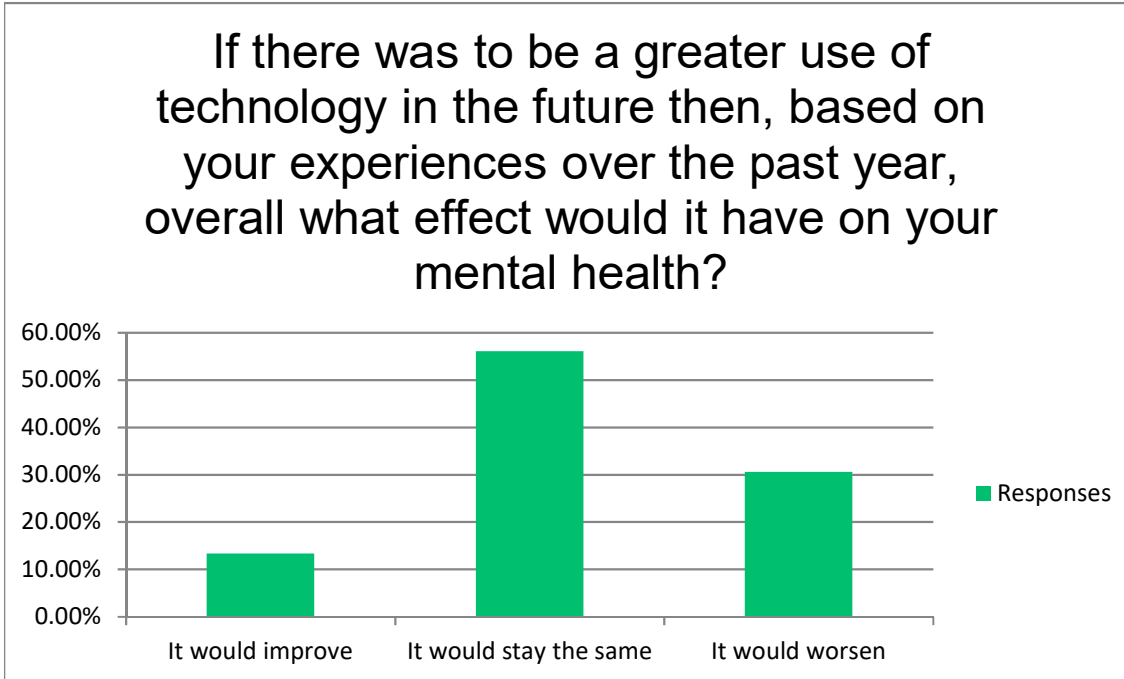
Answer Choices	Responses	
Improved	11.41%	21
It has made no difference	45.11%	83
Worsened	43.48%	80
b. In what ways		119
<b>Answered</b>		<b>184</b>
<b>Skipped</b>		<b>2</b>



### Covid: Remote working post-pandemic

**If there was to be a greater use of technology in the future then, based on your experiences over the past year, overall what effect would it have on your mental health?**

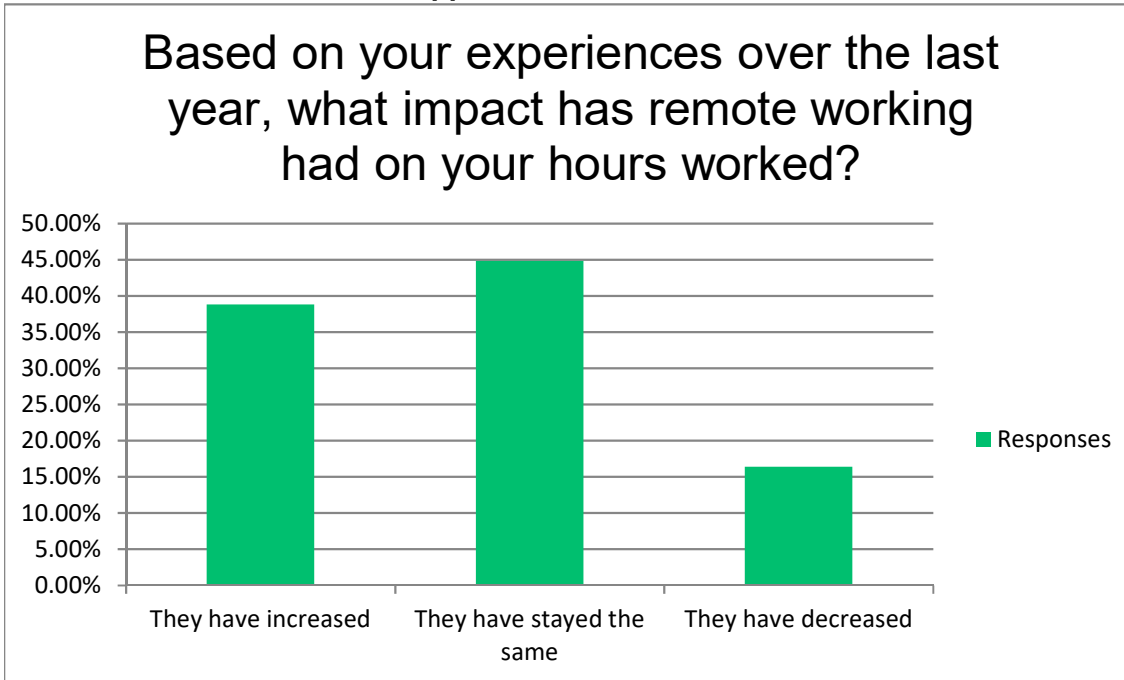
Answer Choices	Responses	
It would improve	13.33%	24
It would stay the same	56.11%	101
It would worsen	30.56%	55
b. In what ways		101
<b>Answered</b>		<b>180</b>
<b>Skipped</b>		<b>6</b>



## Covid: Remote working post-pandemic

**Based on your experiences over the last year, what impact has remote working had on your hours worked?**

Answer Choices	Responses	
They have increased	38.80%	71
They have stayed the same	44.81%	82
They have decreased	16.39%	30
	<b>Answered</b>	<b>183</b>
	<b>Skipped</b>	<b>3</b>

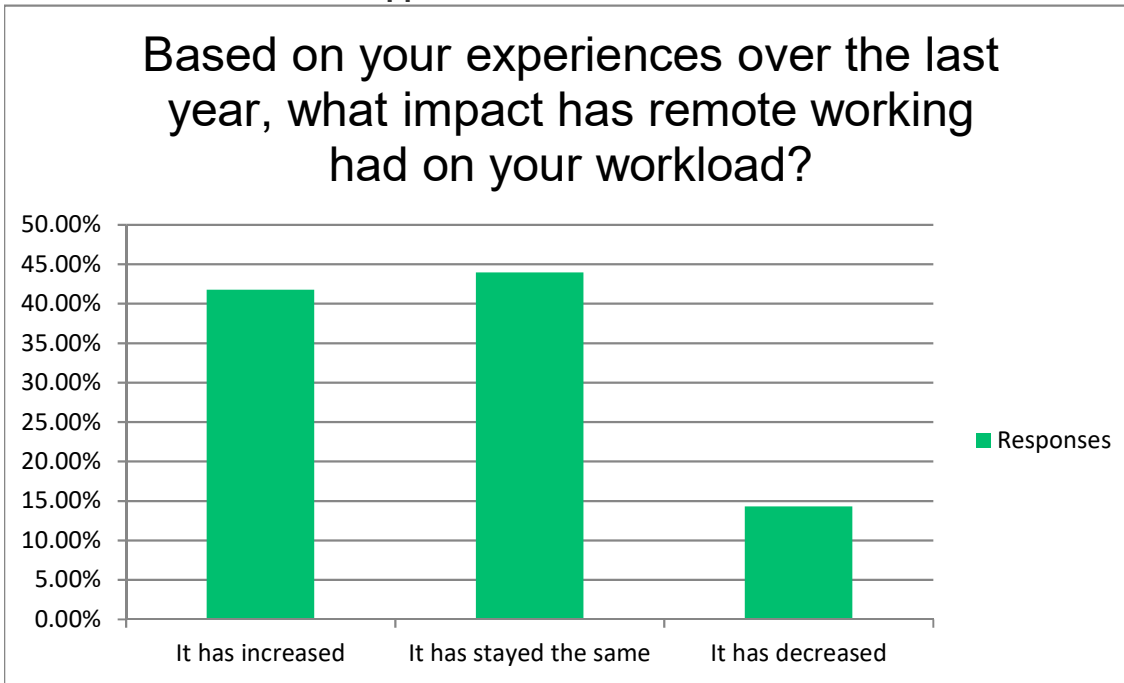




### Covid: Remote working post-pandemic

Based on your experiences over the last year, what impact has remote working had on your workload?

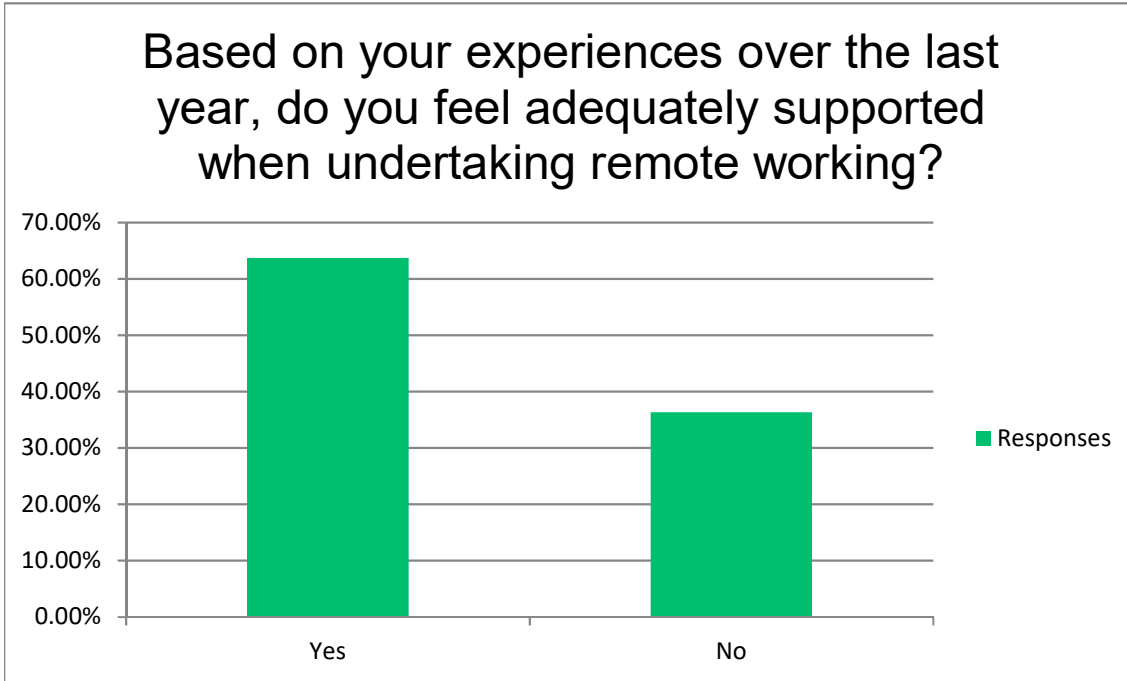
Answer Choices	Responses	
It has increased	41.76%	76
It has stayed the same	43.96%	80
It has decreased	14.29%	26
<b>Answered</b>		<b>182</b>
<b>Skipped</b>		<b>4</b>



### Covid: Remote working post-pandemic

**Based on your experiences over the last year, do you feel adequately supported when undertaking remote working?**

Answer Choices	Responses
Yes	63.69% 114
No	36.31% 65
If no, what aspects of remote working cause you not to feel adequately supported?	64
<b>Answered</b>	<b>179</b>
<b>Skipped</b>	<b>7</b>

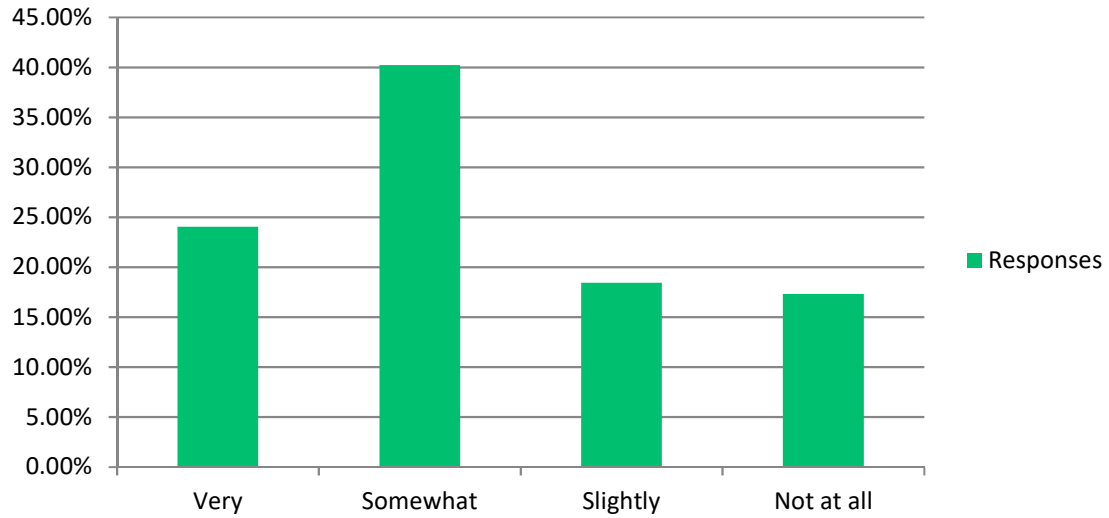


## Covid: Remote working post-pandemic

### Do you feel comfortable asking for support, if needed?

Answer Choices	Responses	
Very	24.02%	43
Somewhat	40.22%	72
Slightly	18.44%	33
Not at all	17.32%	31
<b>Answered</b>		<b>179</b>
<b>Skipped</b>		<b>7</b>

Do you feel comfortable asking for support, if needed?



### Covid: Remote working post-pandemic

**Based on your experiences over the past year, do you think that remote working has led to?**

Answer Choices	Responses	
Greater equality in the workplace	9.44%	17
No change in equality in the workplace	61.11%	110
Less equality in the workplace	29.44%	53
	<b>Answered</b>	<b>180</b>
	<b>Skipped</b>	<b>6</b>

