

RESEARCH SUMMARY REPORT

The Law Society of NSW

A FAIR POST-COVID JUSTICE SYSTEM: CANVASSING MEMBER VIEWS

JANUARY 2022



HEARTWARD

STRATEGIC

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Executive summary

RESEARCH BACKGROUND AND METHOD

The COVID-19 pandemic prompted many swift changes to workplaces and industries to accommodate health and safety risks and business restrictions. In Australia's justice system, changes were adopted to enable justice to be administered remotely. Changes have been widespread, impacting many parties and processes in the system.

The Law Society of NSW was aware that these changes had represented a challenge for legal practitioners, and that impacts had been both positive and negative. To support its policy position and advocacy efforts, the Law Society commissioned Heartward Strategic to conduct research with its members to better understand how these changes have impacted practitioners in NSW and the extent to which members support or reject these changes remaining a permanent part of their working lives.

This report presents a summary of key findings from a quantitative online survey, sent out to all current members of the Law Society, and completed by 1,483 members between 13 July and 4 August, 2021. The final sample broadly reflects the Law Society's membership base on key characteristics such as gender, years since admission, location, practice type, practice size and practice area.

The survey included the following modules, with questions covering:

- Classification – Including member demographics, areas of practice and types of workplace.
- Litigation – Members practising in civil or criminal litigation and who had participated in at least one of the larger Federal and NSW-based courts and tribunals since March 2020 (when the pandemic was declared), were asked to nominate the courts, and (for each nominated court) the changed processes, on which they wished to provide feedback.
- Advisory – Members practising in advisory/transactional work, in at least one of 13 key areas of law, were asked to nominate the areas of law, and for each nominated area of law, the processes, on which they wished to provide feedback.
- Impacts on legal workplaces, perceived impact on the integrity of the legal system, and views on what role the Law Society might usefully play to support members.

The survey resulted in richly detailed findings which can be used by the Law Society to inform its advocacy to government and the courts in navigating the future of the justice system as the immediate need for changed processes recedes. This report seeks to provide a snapshot of key findings only, reporting aggregated data at the process level.

SURVEY FINDINGS IN BRIEF

- The vast majority of changed processes in the sphere of **litigation** were considered to have had a positive impact overall, with members welcoming the opportunity to retain them so they could choose to use them in some situations, with time and cost efficiencies particularly appreciated. The exceptions to this were: remote cross-examination of witnesses; and remote court hearings with an unrepresented party, with relatively high levels of responses questioning the fundamental suitability of remote methods for these tasks. Across the board, 69% of members involved in litigation agreed that there should always be an opportunity for court processes to take place in person.
- Positive sentiment outstripped negative sentiment for all changed processes in the sphere of **advisory** or transactional work, with members welcoming the opportunity to retain the changed processes so they could be chosen for some situations with time and cost efficiencies, again, particularly appreciated. The process change least controversial and most valued on an ongoing basis, was the shift to using an

online platform to lodge documents on behalf of a client. By contrast, participating in mediation, or other alternative dispute resolution remotely, was the process members were least likely to value and the process least likely to be considered to have had a positive impact overall.

- Across the board, 42% felt the overall impact of these **workplace changes** on their law practice or legal team had been positive, 25% that it had been negative. 70% expressed the preference to keep the workplace changes for some situations only. Positive impact was most seen in efficiency of practice and ability to meet CPD requirements. The potential for better work/life balance, created by greater acceptance of flexible working conditions, was a further perceived positive of the COVID-related changes. Negative impacts were more consistently perceived in the areas of professional networking, ability to develop junior staff and staff mental health and wellbeing.
- Just under a quarter (22%) of members believed there to have been a negative impact overall on the **integrity of the justice system** arising from COVID-related changes. Strongest concern was revealed about a negative impact on public access to viewing of court hearings, participation of clients or witnesses in court and litigant access to support services. On the other side of the equation, some saw the potential for remote processes to increase accessibility and access to justice, and to protect vulnerable parties.
- Positive feedback was received in relation to Law Society activities to date, that have supported members through COVID. Most commonly, **members called for the Law Society of NSW to:**
 - communicate changes as they occur and upskill members to meet the challenges of adaptation;
 - advocate on members' behalf for the retention of the most valuable remote approaches (while helping to reduce inconsistencies and iron out technology issues), but at the same time, for the return to face-to-face processes where in-person contact is particularly important;
 - continue a focus on supporting member mental health and wellbeing; and
 - continue to facilitate remote, low or no cost access to Law Society services.

Many expressed appreciation for the opportunity to provide feedback and be heard through the survey process.

CONCLUSIONS IN BRIEF

COVID-related changes have required legal practitioners to change the way they practise law, while navigating new realities in their work situation. In brief, the findings from this survey suggest that while these adjustments have been challenging at times, few want things the way they were. Instead, most can see benefits to many of the changes and want to be able to access them into the future.

The Law Society of NSW's efforts to support members during the pandemic are noted and appreciated. Moving forward, the results of this research suggest that the Society can best continue to support members by:

- advocating externally for the continuance of processes with indisputable time and cost efficiencies, while calling out those processes for which face-to-face contact is crucial;
- advocating within the profession for employers to consider these changes as an opportunity to recast their relationship with employees with respect to flexibility and work/life balance;
- continuing to keep members abreast of changes and assist them as much as possible to adapt; and
- continuing to provide valued mental health and wellbeing support.

The Law Society of NSW is in a strong position to respond to the unique needs of this situation, by continuing to innovate in fostering a sense of community within the profession (despite remote working) and help address the workplace relational challenges brought about by COVID-19 changes.

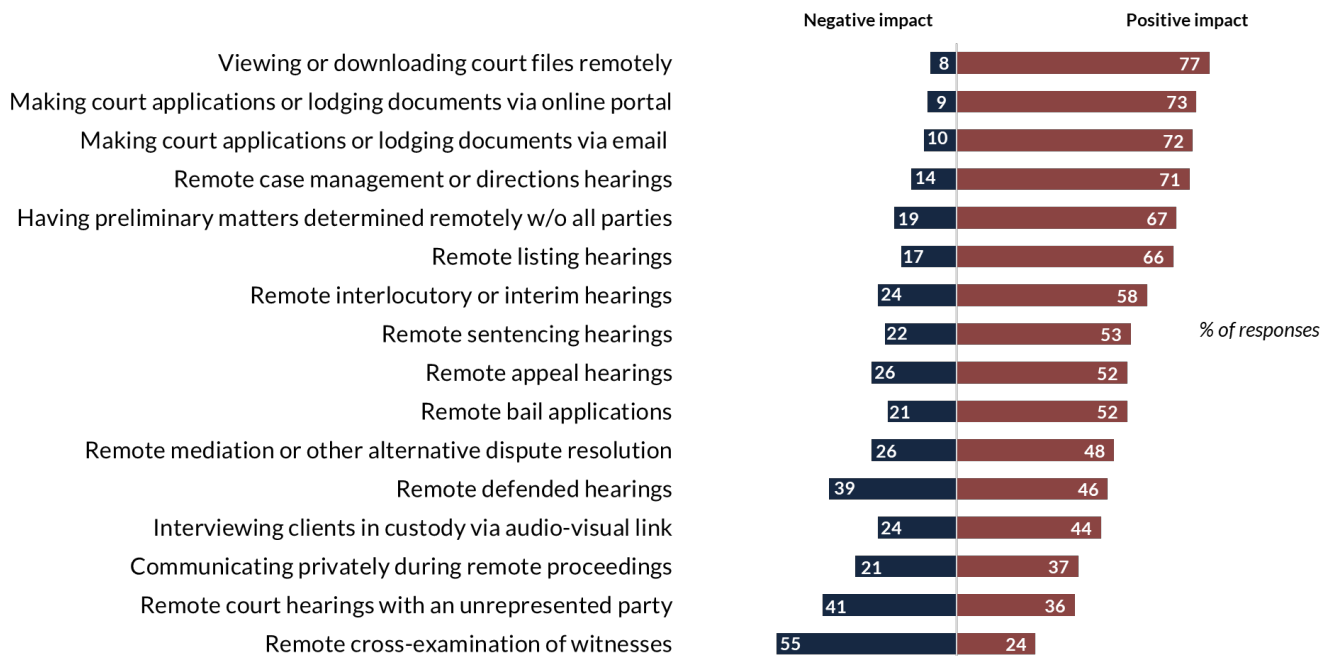
Survey findings

LITIGATION

OVERALL PERCEIVED IMPACT OF CHANGES TO COURT PROCESSES

Feedback was sought on 16 processes that members may have experienced remotely in virtual court. Figure 1, below, lists these processes from most to least often perceived to have had a positive impact overall. As illustrated, the vast majority of these changed processes were considered, on balance, to have had a positive impact overall. Procedural processes, such as viewing/downloading court files, making court applications or lodging documents, were most widely acknowledged to have had a positive impact overall. The only two processes for which negative responses outweighed positive responses, were remote court hearings with an unrepresented party, and remote cross-examination of witnesses.

Figure 1. Perceptions of the overall impact (positive/negative) of changed processes for virtual court



Question: In your view, has the overall impact of this change been... very positive /positive/neither positive nor negative/negative/very negative/no impact (Netts of very positive/positive & negative/very negative)

Base: Total responses provided for each process (n=114 to n= 989)

POSITIVE IMPACTS OF CHANGES TO COURT PROCESSES

Across the processes, the most commonly appreciated benefits included:

- Time efficiency for the legal practitioner
- Time efficiency for the client
- Cost efficiencies
- Time efficiency for other parties
- Access to justice

Feedback captured in open-ended questions suggested that many of these benefits were perceived to have stemmed from increased flexibility and accessibility, particularly advantageous for certain practitioners and clients, such as those living in regional areas or with mobility issues, who have traditionally found it harder to meet and attend court.

NEGATIVE IMPACTS OF CHANGES TO COURT PROCESSES

Perceived negative impacts of changed processes tended to be more process-specific. Negative impacts were most commonly perceived in the areas of:

- Fairness to each party
- Court etiquette or professional courtesy
- Client and lawyer communications
- Security or privacy
- Ability to settle a dispute early

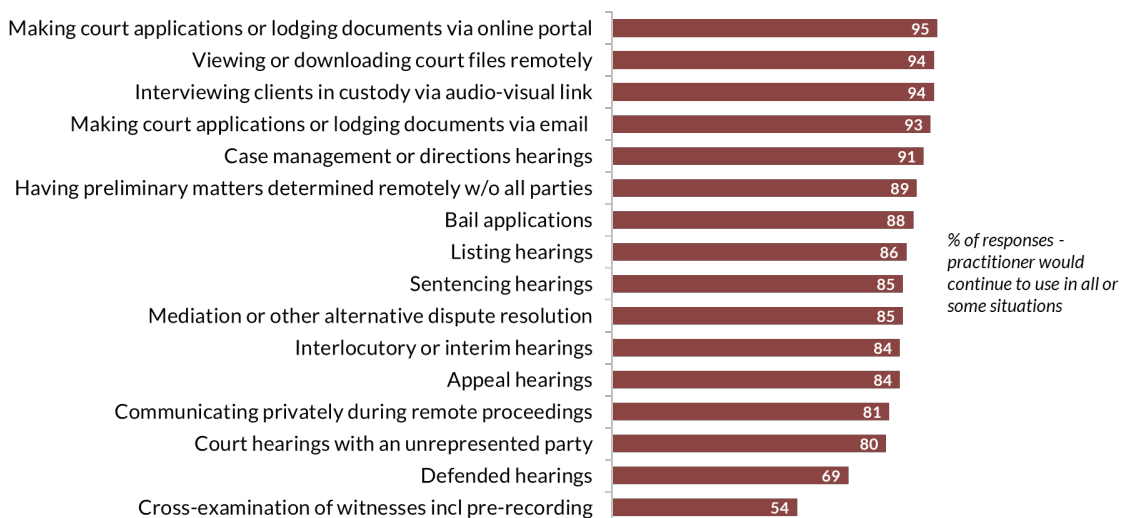
Feedback captured in open-ended questions suggested that at least some of the perceived negative impacts might lessen as ‘teething issues’ are ironed out, and processes become clearer.

In terms of technology, the most reported challenge was connectivity or internet issues.

SUPPORT FOR RETAINING CHANGES TO COURT PROCESSES

For each process asked about, feedback was typically that the change would be useful to retain. Cross-examination of witnesses was the only process for which the most common feedback (46% of responses) was that members would not keep using the changed process for any situation, if they had a choice. By contrast, for making applications or lodging documents via an online court portal or via email, and viewing or downloading court files remotely, the most frequent response was that members would keep using the changed process (i.e. participating in these processes remotely) in every situation given the choice (between 50 and 63% of responses). For all other processes, the most common response was that members would keep using the changed process in some situations, if they had a choice.

Figure 2. Proportion of members wishing to continue to use process in all or some situations



Question: If you had a choice, would you keep using the changed process? (net of yes, in every situation and yes, for some situations)

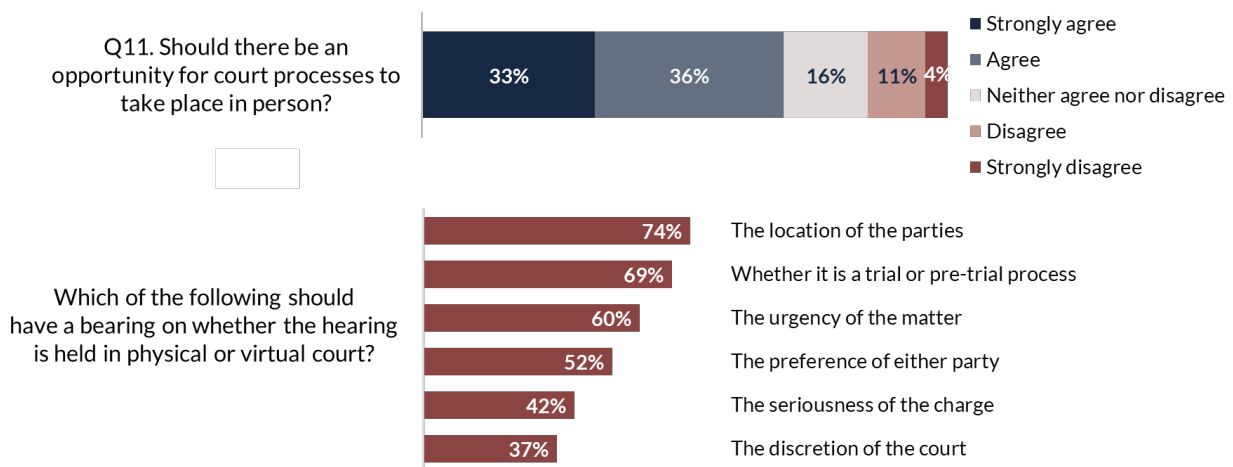
Base: Total responses provided for each process (n=114 to n= 989)

Among all members who had participated in at least one court or tribunal since March 2020, 69% of members agreed that there should always be an opportunity for court processes to take place in person, 15% disagreed, and 16% provided a neutral response.

The location of the parties and whether it is a trial or pre-trial process were the most commonly nominated factors members believed should have a bearing on *whether a hearing is held in physical or virtual court*, nominated by 74% and 69% of members who had participated in a court/tribunal since March 2020. Only the seriousness of the charge (in criminal matters) and the discretion of the court were considered factors that should have a bearing by less than half of those answering this question.

Some members chose to describe other factors they felt should have a bearing on this decision. Common ‘other’ responses included: whether either party is unrepresented; whether cross-examination is required; the length and complexity of the matter and whether it is contested; the nature of any evidence; and access to technology.

Figure 3. Views on the importance of, and key considerations for, retaining in person processes



Question: Should there be an opportunity for court processes to take place in person?

Question: Which of the following should have a bearing on whether the hearing is held in physical or virtual court?

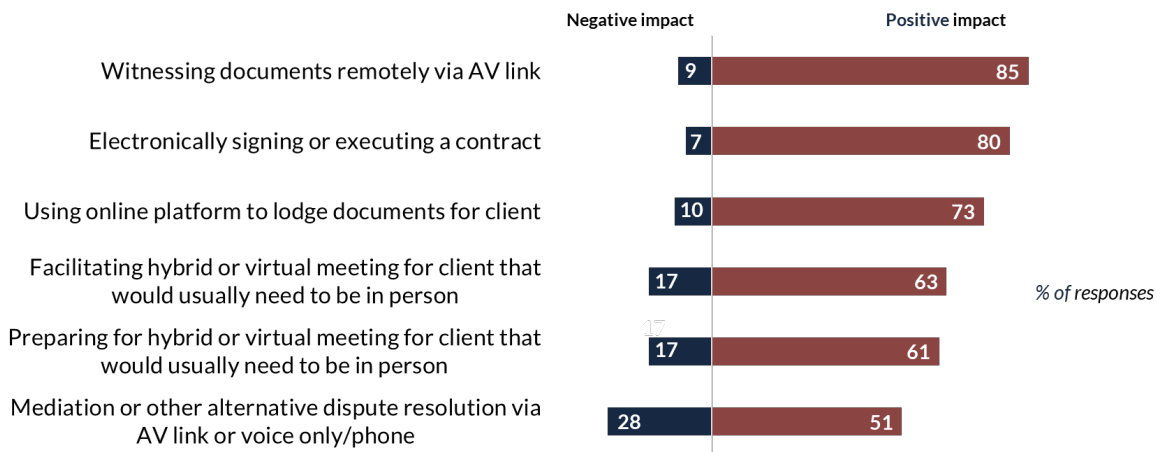
Base: All members participating in at least one court/tribunal since March 2020 (n=977)

ADVISORY

OVERALL PERCEIVED IMPACT OF CHANGES TO ADVISORY PROCESSES

Feedback was sought on processes that members may have experienced remotely as part of their advisory or transactional work since March 2020. Figure 4, lists the most experienced processes from most to least often perceived to have had a positive impact overall. This shows that for all six processes, positive sentiment outstripped negative sentiment. Witnessing documents remotely via audio-visual link, electronically signing or executing a contract and using an online platform to lodge documents on behalf of a client, were most widely acknowledged to have had a positive impact overall.

Figure 4. Perceptions of the overall impact (positive/negative) of advisory processes experienced remotely



Question: In your view, has the overall impact of this change been... very positive /positive/neither positive nor negative/negative/very negative/no impact (Netts of very positive/positive & negative/very negative)

Base: Total responses provided for each process (n=280 to n= 538)

POSITIVE IMPACTS OF CHANGES TO ADVISORY PROCESSES

Benefits most commonly appreciated by members included:

- Time efficiency (for the client, legal practitioners and other parties) – particularly in relation to electronic signatures and remote witnessing
- Cost efficiencies
- Access to justice
- Client and lawyer communications – although this was really only in relation to electronic signatures and remote witnessing

Feedback captured in open-ended questions suggested that many of these benefits were perceived to have stemmed from increased flexibility and accessibility - particularly advantageous for certain practitioners and clients, such as those living in regional areas or with mobility issues, who have traditionally found it harder to meet and attend court.

NEGATIVE IMPACTS OF CHANGES TO ADVISORY PROCESSES

Negative impacts of changed processes affecting advisory and transactional work were most commonly perceived in the areas of:

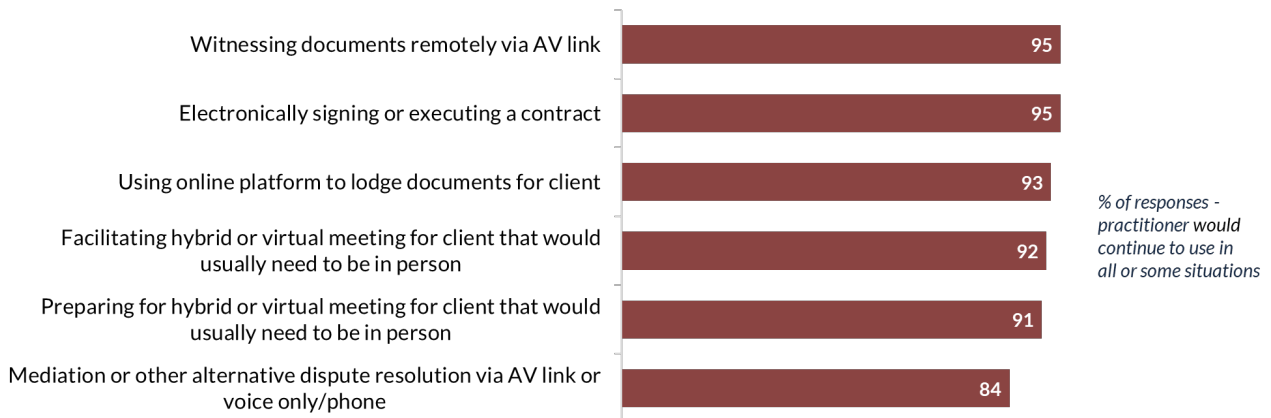
- Security or privacy – for all processes except using an online platform to lodge documents
- Ethics – again, for all processes except online lodgements
- Fairness to each party – particularly in relation to remote alternative dispute resolution and preparing for hybrid or entirely virtual meetings
- Client and lawyer communications – again, particularly in relation to remote alternative dispute resolution and preparing for hybrid or entirely virtual meetings

In terms of technology, the most reported challenges were connectivity or internet issues and lack of familiarity with the technology.

SUPPORT FOR RETAINING CHANGES TO ADVISORY PROCESSES

For each process asked about, most feedback centred on the change being useful to retain. Participating in mediation or other alternative dispute resolution was the process members were least likely to want to keep using – 16% indicated if they had a choice they would not keep using the changed process for any situation.

Figure 5. Proportion of members wishing to continue to use process in all or some situations



Question: If you had a choice, would you keep using the changed process? (net of yes, in every situation and yes, for some situations)

Base: Total responses provided for each process (n=280 to n= 538)

LEGAL WORKPLACES

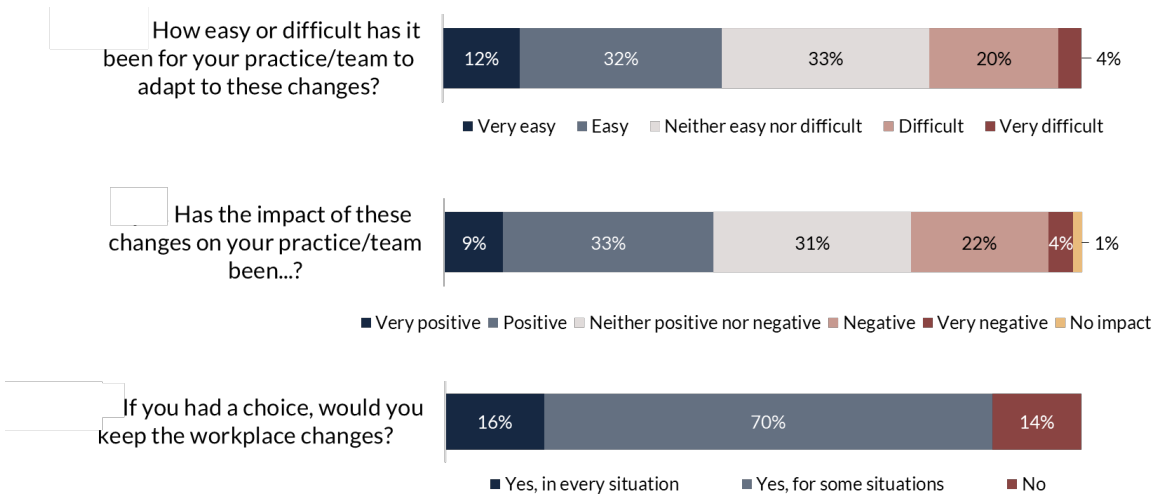
All members completing the survey were asked their view of any challenges in maintaining and managing a law practice or legal team since March 2020, considering changes to legal workplaces that had occurred as a result of the COVID-19 pandemic.

As illustrated in Figure 6, generally, workplace changes were seen to have been easy to adapt to. Just over two in five (44% of members surveyed) reported that it had been easy ('very easy' or simply 'easy') for their law practice or legal team to adapt to workplace changes related to the COVID-19 pandemic, compared to 24% that reported that it had been difficult ('very difficult' or simply 'difficult').

Views on the impacts of the changes were more mixed, with 42% responding that their view was that the overall impact of these workplace changes on their law practice or legal team was positive. This contrasted with roughly a quarter responding that the overall impact had been negative, while roughly one in three provided a neutral response, suggesting the changes to workplaces have had both positive and negative impacts.

A large majority, 70%, reported that if they had a choice, they would keep the workplace changes for some situations only.

Figure 6. General reaction to changes to maintaining and managing a law practice / legal team



Base: All survey participants (n=1,483)

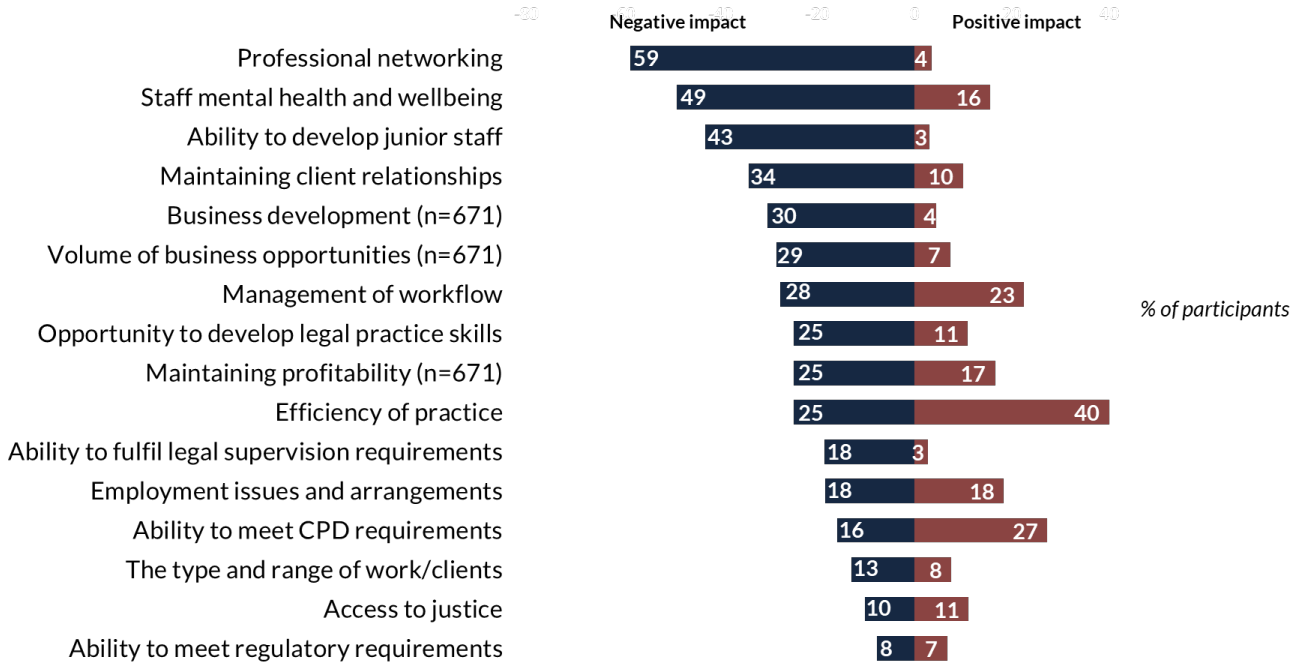
As illustrated in Figure 7, efficiency of practice was the aspect most selected as having been positively impacted by COVID-related changes, with 40% selecting it as an area they believed had been positively impacted. There were only two other aspects of the legal workplace more often believed to have been positively, rather than negatively, impacted by pandemic-related changes – the ability to meet continuing professional development (CPD) requirements, and access to justice.

Other areas perceived as having been positively impacted, mentioned by those providing open-ended responses, included: improved work/life balance (potentially a sub-category of mental health and wellbeing), facilitated by flexible working arrangements (hours and locations); reduced commuting costs; and practitioners' broadened technological skill set (necessitated by the COVID-related changes).

Six aspects were most often viewed as having been negatively impacted by pandemic-related changes, including: professional networking, ability to develop junior staff, staff mental health and wellbeing, business development (for those in private practice), maintaining client relationships, and volume of business opportunities.

Other areas perceived as having been negatively impacted, mentioned by those providing open-ended responses, included: work/life balance (negatively impacted as boundaries between work and home blurred); a reduction in staff harmony, collegiality, and equal treatment; and physical work set up (with a lack of ergonomic workstations and/or access to information technology in home offices for some).

Figure 7. Specific impacts on changes to maintaining and managing a law practice/legal team



Question: Which if any of these have been positively/negatively impacted by changes in legal workplaces since March 2020 related to the COVID-19 pandemic?

Base: All survey participants (n=1,483)

INTEGRITY OF THE JUSTICE SYSTEM

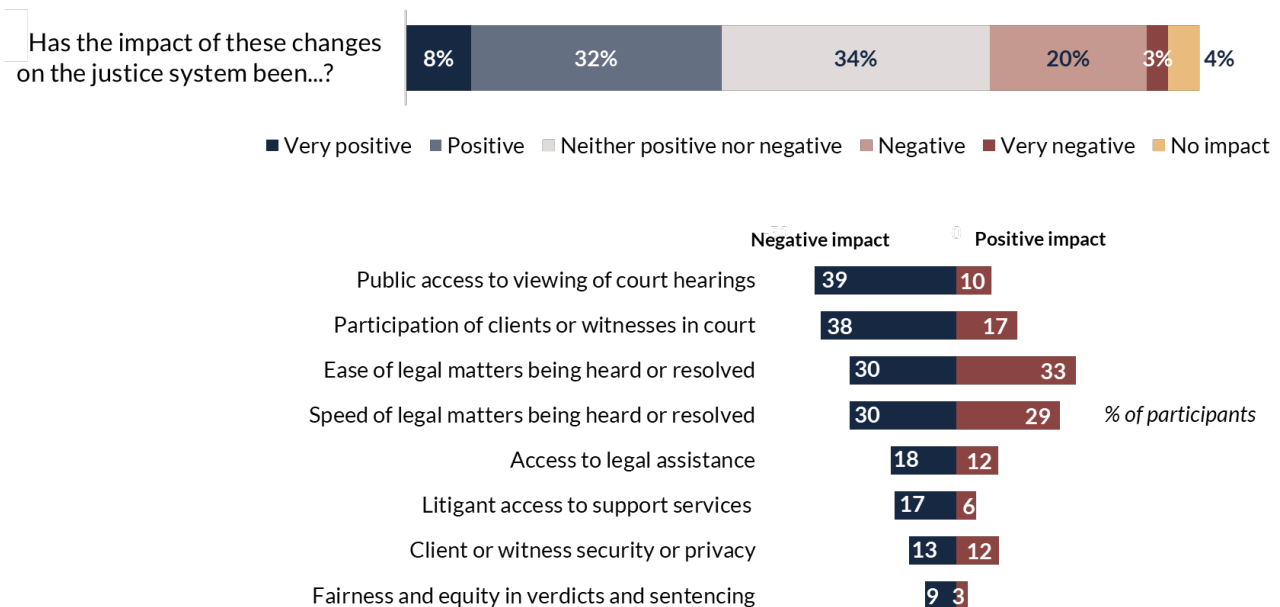
Towards the end, the survey explored overall perceptions of any impact of legal process changes on the integrity of the justice system as a whole.

On balance, the integrity of the justice system was seen to have been positively impacted. As illustrated in Figure 8, below, 40% of members considered the overall impact of pandemic-related changes on the justice system to have been either ‘very positive’ or ‘positive’, while fewer than a quarter expressed the view that the overall impact had been negative (either ‘very negative’ or simply ‘negative’).

Overall, a perceived impact was most reported with respect to both ease and speed of legal matters being heard or resolved, although opinion was almost equally divided on whether the impact had been positive or negative.

Although not attracting widespread concern, on balance, more areas relating to the integrity of the justice system were seen to have been negatively than positive affected, including: public access to viewing of court hearings; participation of clients or witnesses in court; and litigant access to support services.

Figure 8. Views on the impact of COVID-related changes on the integrity of the justice system



Question: Which if any of these have been positively/negatively impacted by changes in legal workplaces since March 2020 related to the COVID-19 pandemic?

Base: All survey participants (n=1,483)

Comments provided by members in a question about the impact of COVID-related changes on the justice system as a whole, were fairly evenly balanced between positive and negative.

Concerns typically centred on disadvantages or limitations of virtual courts, including:

- concerns about the appropriateness of conducting jury trials remotely;
- difficulties adequately questioning and assessing witnesses;
- unrepresented or self-represented litigants being disadvantaged;
- the impact of being unable to examine evidence in person, in court;
- perceived increased difficulty of getting hold of material produced under subpoena;
- a perceived increased disconnection from the criminal justice system;
- reduced ability for junior lawyers to “watch and learn” from other practitioners, or to develop oral advocacy skills.

Positive feedback typically centred on increased use of technology, where unprejudicial, being overdue and a ‘no-brainer’. Several members specifically mentioned greater use of remote processes increasing and access to justice. Additionally, some spoke of the benefit of remote proceedings for vulnerable parties.

VIEWS ON LAW SOCIETY SUPPORT

Members completing the survey were asked about the role the Law Society could usefully play to support members or their clients in dealing with the changes stemming from the COVID-19 pandemic. Around two in five members provided a relevant response. Responses were rich and varied, however, the following broad themes emerged in member requests for support:

- communicate changes as they occur and upskill members to meet the challenges of adaptation;
- advocate on members' behalf to government and courts for the retention of the most valuable remote approaches (while helping to reduce inconsistencies and iron out technology issues associated with these);
- advocate on members' behalf to government and courts for the earliest possible return to face-to-face processes where in-person contact is particularly important;
- advocate to partners and employers for the benefits of flexible work arrangements to be retained wherever possible, and to be mindful of workload and work/life balance issues;
- focus on supporting member mental health and wellbeing, including in terms of isolation and helping to set boundaries when working from home; and
- continue to facilitate, and potentially expand remote, low or no cost access to Law Society services.

Comments indicating a wish for the Law Society to advocate for a swift return to pre-pandemic processes and practices were rare. Consistent with other findings from the survey, most members focused on ways to maximise the benefits, and minimise the disadvantages, of remote operations. Some even perceived change to be *overdue*. Where concern was expressed, it was almost entirely relating to in-person presentation in court.

Conclusions

The findings of this research confirm that changes adopted in response to the COVID-19 pandemic, enabling justice to be administered remotely, have presented challenges to legal practitioners. However, few are calling for urgent reinstatement of the pre-COVID status quo, with many hoping that some of the changes brought about by the pandemic will remain a permanent part of their working lives. Remote delivery of processes has indisputable time efficiencies, cost savings, and benefits for accessibility/flexibility. Furthermore, some members took a longer term view that many challenges presented by changed processes can be met overtime, with the mitigation of risks in remote processes and work practices.

In the realm of advisory and transactional work, remote witnessing of documents, contract executions and electronic signatures are highly valued and a permanent move to this is considered overdue. However, there are concerns about lack of consistency across contexts, a lack of certainty around what will be accepted, and some fear legislative change will not be achieved in a timely manner. Members would appreciate the Law Society NSW advocating on their behalf as well as providing them with relevant updates and clarifications. A majority of members would also like to see the permanent shift towards being able to lodge documents on behalf of a client via an online platform. Many have, however, experienced challenges due to a lack of familiarity with the technology and some platforms have problems or bugs needing rectification.

In the field of litigation, a similar experience exists for the process of making applications or lodging documents with a court. Members would like to continue to do this remotely, particularly via an online court portal, but there are currently challenges by way of lack of consistency across courts/tribunals, and upload limits being too small. While virtual courts are perceived to have strengths, the importance of allowing for some court processes to take place in person is widely acknowledged. Remote court is considered best suited to appearances of a procedural nature, with concern expressed about hearings involving unrepresented parties, defended hearings, cross-examinations, witnesses, complex evidence, and juries. Virtual court was also seen to remove the incidental opportunity to settle prior to the start of hearings. Mediations and other alternative dispute resolution (in the advisory field) are also seen to be typically more difficult to conduct remotely.

Some legal processes, while not engaged in by many members (thus attracting little feedback), are nonetheless considered important and if handled poorly have high potential to negatively impact access to justice. Worth further consideration are the issues of: public access to courts; maintaining quality lawyer/client relationships during lockdowns; and feeling part of (and subject to) the justice system, particularly in criminal litigation work.

Law Society advocacy efforts and support provided to members to date appear to have been well received and to have largely hit the mark. Members would benefit from continuing to be kept up to date with latest developments, directives and changes to processes. This could be usefully supplemented with specific training, guidance or advice. In the broader context of legal workplaces, findings suggest members might benefit from help: facilitating remote networking; addressing difficulties developing junior staff during remote working arrangements; and in the area of staff mental health and wellbeing, advice and guidance managing the increasing blur between work and homelife, dealing with isolation, and helping to put downward pressure on pace and workloads during the pandemic.