

Report and recommendations

Understanding the impact of COVID-19 on tribunals

The experience of tribunal judges

Dr Natalie Byrom
Sarah Beardon
June 2021



Table of Contents

FOREWORD FROM SIR KEITH LINDBLOM, SENIOR PRESIDENT OF TRIBUNALS.....	5
1 EXECUTIVE SUMMARY	8
A. BACKGROUND	8
B. ABOUT THE SURVEY AND RESPONDENTS.....	8
C. FINDINGS: GUIDANCE AND SUPPORT.....	9
D. SATISFACTION WITH TECHNOLOGY.....	10
E. REMOTE HEARINGS AND ACCESS TO JUSTICE I: ACCESS TO HEARINGS.....	10
F. REMOTE HEARINGS AND ACCESS TO JUSTICE II: PARTICIPATION IN FAIR AND EFFECTIVE HEARINGS.....	11
F.1. IDENTIFYING VULNERABILITY AND MAKING ADJUSTMENTS.....	11
F.2. REMOTE HEARINGS AND LEVELS OF LEGAL REPRESENTATION	12
F.3. REMOTE HEARINGS AND EFFECTIVE COMMUNICATION	13
F.4. VIDEO HEARINGS AND THE ABILITY OF PARTIES TO EFFECTIVELY PUT THEIR CASE	14
F.5. REMOTE HEARINGS AND FAIR DECISIONS IN ACCORDANCE WITH LAW	15
F.6. THE IMPACT OF REMOTE HEARINGS ON PARTIES’ PERCEPTIONS OF FAIRNESS	15
G. THE IMPACT OF REMOTE HEARINGS ON JUDICIAL WELLBEING	15
H. RECOMMENDATIONS.....	17
2 INTRODUCTION.....	21
A. OVERVIEW	21
B. PROCEDURAL CHANGES.....	21
C. PRACTICAL ADAPTATIONS.....	22
D. VARIATION ACROSS CHAMBERS	23
E. KEY QUESTIONS ARISING FROM CHANGES	23
3 METHODOLOGY AND APPROACH	25
A. OVERVIEW: HOW WAS DATA COLLECTED?.....	25
B. UNDERSTANDING THE CONTEXT AND FRAMING THE FINDINGS	25
C. THE ONLINE SURVEY.....	25
D. LIMITATIONS.....	25
4 FINDINGS: ABOUT THE RESPONDENTS	27
A. OVERVIEW	27
B. RESPONDENTS BY JURISDICTION	27
C. LOCATION OF RESPONDENTS.....	28
D. EXPERIENCE OF RESPONDENTS WITH REMOTE HEARINGS	28
E. LOCATION WHEN JOINING HEARINGS.....	29
5 FINDINGS: GUIDANCE AND SUPPORT	32
A. OVERVIEW	32
B. SATISFACTION WITH GUIDANCE	32

C.	SATISFACTION WITH ADMINISTRATIVE SUPPORT	34
D.	PROVISION OF IT SUPPORT	36
E.	SATISFACTION WITH IT SUPPORT	36
F.	ACCESSING PAPERS	38
G.	SATISFACTION WITH RESOURCES PROVIDED	39
6	FINDINGS: SATISFACTION WITH TECHNOLOGY	40
A.	OVERVIEW	40
B.	EQUIPMENT NEEDED TO CONDUCT REMOTE HEARINGS	40
C.	WHO PROVIDED THE EQUIPMENT FOR REMOTE HEARINGS?.....	41
D.	HOW MANY PLATFORMS HAVE RESPONDENTS USED TO CONDUCT REMOTE HEARINGS?	42
E.	SATISFACTION WITH PLATFORMS	42
F.	SATISFACTION WITH BT MEETME.....	43
G.	SATISFACTION WITH CLOUD VIDEO PLATFORM.....	44
7	REMOTE HEARINGS AND ACCESS TO JUSTICE	48
A.	OVERVIEW	48
B.	DEFINING ACCESS TO JUSTICE.....	48
C.	REMOTE HEARINGS AND ACCESS TO TRIBUNALS UNDER COVID-19.....	48
C.1.	REMOTE HEARINGS AND PRACTICAL ACCESS TO TRIBUNALS UNDER COVID-19	49
C.2.	REMOTE HEARINGS AND ATTITUDES TO ACCESSING TRIBUNALS UNDER COVID-19	51
D.	ACCESS TO A FAIR AND EFFECTIVE HEARING.....	52
D.1.	WHICH HEARINGS ARE WELL SUITED TO BEING CONDUCTED REMOTELY?	54
D.2.	THE IMPACT OF REMOTE HEARINGS ON THE ABILITY TO IDENTIFY AND ADDRESS VULNERABILITY	55
D.2.1.	IDENTIFYING VULNERABILITY IN THE HEALTH, EDUCATION AND SOCIAL CARE CHAMBER	60
D.2.1.1.	ISSUES WITH TECHNOLOGY IMPLICATED IN ISSUES WITH ASSESSING VULNERABILITY	62
D.2.1.2.	DIFFICULTIES PROVIDING REASONABLE ADJUSTMENTS FOR PARTIES	63
D.2.1.3.	MODE OF HEARING EXACERBATING PATIENT’S SYMPTOMS.....	63
D.2.1.4.	RISKS TO STAFF AND PATIENTS DURING REMOTE HEARINGS.....	64
D.3.	THE IMPACT OF REMOTE HEARINGS ON LEVELS OF REPRESENTATION.....	65
D.4.	THE IMPACT OF REMOTE HEARINGS ON EFFECTIVE COMMUNICATION.....	68
D.4.1.	THE IMPACT OF TELEPHONE HEARINGS ON PRACTICAL BARRIERS TO COMMUNICATION	69
D.4.2.	THE IMPACT OF TELEPHONE HEARINGS ON PSYCHOLOGICAL BARRIERS TO COMMUNICATION.....	71
D.4.3.	THE IMPACT OF VIDEO HEARINGS ON PRACTICAL BARRIERS TO COMMUNICATION.....	72
D.4.4.	THE IMPACT OF VIDEO HEARINGS ON PSYCHOLOGICAL BARRIERS TO PARTICIPATION.....	73
D.4.5.	THE IMPACT OF REMOTE HEARINGS ON COMMUNICATION IN THE HEALTH, EDUCATION AND SOCIAL CARE CHAMBER	74
D.5.	THE IMPACT OF TELEPHONE HEARINGS ON THE ABILITY OF PARTIES TO EFFECTIVELY PRESENT THEIR CASE	78

D.6. THE IMPACT OF VIDEO HEARINGS ON THE ABILITY OF PARTIES TO EFFECTIVELY PUT THEIR CASE.....	80
D.6.1. THE IMPACT OF VIDEO HEARINGS ON COMMUNICATION WITH REPRESENTATIVES.....	82
D.6.2. THE IMPACT OF VIDEO HEARINGS ON THE STRUCTURE OF HEARINGS	83
D.6.3. THE IMPACT OF VIDEO HEARINGS ON SUPPORTER ATTENDANCE	83
D.6.4. IMPACT OF VIDEO HEARINGS ON FORMALITY	84
D.7. THE IMPACT OF REMOTE HEARINGS ON ACCESS TO A DECISION IN ACCORDANCE WITH LAW	85
D.8. IMPACT OF REMOTE HEARINGS ON PARTIES’ PERCEPTIONS OF JUSTICE	86
8 REMOTE HEARINGS AND JUDICIAL WELLBEING.....	89
A. OVERVIEW	89
B. THE IMPACT OF REMOTE HEARINGS ON JUDICIAL OFFICE HOLDERS’ SATISFACTION WITH THEIR ROLE	89
B.1. REMOTE HEARINGS INCREASE THE BURDEN ON JUDGES	92
B.2. REMOTE HEARINGS REQUIRE JUDGES TO ADAPT THEIR SKILLSET	93
B.3. THE IMPACT OF REMOTE HEARINGS ON THE ABILITY TO CONTROL PROCEEDINGS	93
B.4. IMPACT ON RELATIONSHIPS WITH PANEL MEMBERS.....	94
B.5. JOB SATISFACTION AND WELLBEING	94
C. REMOTE HEARINGS AND TIREDNESS.....	96
C.1. TIREDNESS AND AUDIO HEARINGS.....	97
C.2. TIREDNESS AND VIDEO HEARINGS.....	97
C.3. HYBRID HEARINGS AND TIREDNESS.....	98
9 BIBLIOGRAPHY.....	100
A. CASES.....	100
B. PRIMARY LEGISLATION	100
C. SECONDARY LEGISLATION	100
D. PRACTICE DIRECTIONS	100
E. BLOGS.....	100
F. PUBLICATIONS.....	101

Foreword from Sir Keith Lindblom, Senior President of Tribunals

In the early days of “lock-down” in 2020, my predecessor as Senior President of Tribunals, Sir Ernest Ryder, commissioned Dr Byrom and the Legal Education Foundation to carry out a survey of tribunals judicial office holders who had sat in remote hearings between 19 March 2020 and 31 July 2020, to gather feedback on their experiences. Identifying any lessons to be learnt is, of course, an important exercise. And, as we consider how best to go forward in the tribunals when the Covid-19 pandemic has passed, we must look back at what has worked well and what has not. With this in mind, I am grateful for the work that Dr Byrom and the foundation have put into the survey and the report on its findings. This will undoubtedly help us in our recovery from the pandemic, and also in the continuing work of reform, which had begun long before 2020.

We should not underestimate the success we have achieved in the last 15 months. We have maintained access to justice, and the delivery of justice, throughout the pandemic. Much tribunals business has been conducted remotely in an effective way. But we must recognise, and now we certainly know, that much of our work is best conducted face-to-face. In-person hearings will continue to have their place within the justice system. There will always be cases that are more appropriately heard in-person. My view on this remains unchanged, despite the effectiveness of remote hearings in many cases. And it is not surprising that Dr Byrom’s report helps us to see why in many cases video or telephone hearings are not going to be the best service we can deliver in the future.

During the pandemic a balance has had to be struck between conducting remote hearings and adjourning until a hearing can be held in-person. In many cases, although a face-to-face hearing would have been the ideal, the unavoidable delay has made it inevitable that the interests of justice require a hearing to be held by remote means. Decisions on the most appropriate form of hearing in the circumstances have had to be made, keeping in mind the overriding objective of dealing with cases fairly and justly.

A significant factor in ensuring that the tribunals have continued to function so well during the pandemic has been the willingness of judicial office holders to embrace the use of new technology and to adapt to changing circumstances. Many remote hearings by telephone were listed immediately. And the introduction of the Cloud Video Platform across the tribunals has allowed for audio and video hearings to be held on computers, tablets and mobile phones. The quick response by the tribunals in providing guidance on remote hearings, regular communication between leadership judges and HMCTS to tackle difficulties when they have arisen, and the steps taken to ensure that judicial office holders are provided with the necessary equipment for cases to be heard remotely, have all been essential.

The speedy adoption of new technology and new practices was not without its challenges. It should be remembered that between March and July 2020 the tribunals were only beginning to use telephone and video hearings on a large scale. Dr Byrom’s report touches on some of the difficulties experienced by

judicial office holders in the infancy of remote hearings. As one would expect, the experience we have gained has helped us to improve efficiency, and to recognise the need for adequate technology and sufficient support from our administrative staff. We have come to see that remote hearings are not necessarily shorter than face-to-face hearings, and that they undoubtedly require more staff to support them than many had supposed.

An important challenge illustrated by the report is the effect of remote hearings on vulnerable tribunal users, including those who have hearings in the mental health jurisdiction of the Health, Education and Social Care chamber. During the pandemic the chamber has had to do what it can to maintain access to justice for vulnerable users while at the same time protecting the welfare of judicial office holders and coping with the strict public health rules on visiting hospitals. Adjourning all hearings until they could be conducted in-person would have caused long delays for mental health patients, risking harm to their wellbeing. While the limitations of video hearings were recognised, it was also understood that, if they could be appropriately conducted, they were the only means by which access to justice could be maintained. Since July 2020 the chamber has taken steps to overcome many of the challenges identified in the report. Two salaried judges now act as video hearing leads, engaging directly with hospital trusts to help them identify and resolve issues. This is part of a wider strategy of communication – to encourage hospital trusts to invest in the necessary equipment for hearings, to explain practice and procedure, and to gather feedback from professional users and patients on their experiences. The chamber has also engaged with the Royal College of Psychiatrists and MIND to discuss the potential difficulties in remote hearings for patients and how to mitigate them.

Although – as we have come to see during the pandemic – in-person hearings will always be the best in many cases, there will also be some proceedings in which a remote hearing is appropriate and may also provide swifter or easier access to justice. Dr Byrom’s report points to a number of potential benefits of remote hearings, including the fact that some users of the tribunals find themselves better able to engage with the adjudicative process when at home rather than in a hearing room, and the fact that some with impaired mobility or who have other difficulties in travelling to or attending a hearing will also find the tribunal more accessible remotely.

With a view to ensuring that remote hearings remain fair, accessible and properly conducted, the report recommends improvements in the guidance and support offered to judicial office holders. Here, the judiciary and HMCTS have been working together. All judicial office holders have now been trained in using the Cloud Video Platform, and more generally on the efficient and effective conduct of remote hearings. And the tribunals continue to work with the Judicial College in developing additional materials, such as training videos, which can be used more widely. Chamber and tribunal Presidents have revised the guidance on the conduct and listing of remote hearings, and the Equal Treatment Benchbook has also been revised to include specific advice for judges on carrying out remote hearings. The judiciary have been working with HMCTS to improve the availability of monitors and other hardware necessary for the

conduct of remote hearings to fee-paid judges and non-legal members; and to ensure that PDF reading and editing software is available to all judicial office holders, to help them navigate electronic bundles. The tribunals are also co-operating with HMCTS to develop a bespoke video hearing platform that will cater for the individual needs of each jurisdiction and its users. Judges are fully involved in this project, knowing that their views will need to be heard, and acted upon, if the new platform is to improve on the Cloud Video Platform and other standard products.

Many of the initiatives undertaken after the closing of the survey have unquestionably improved the experience of remote hearings for both judicial office holders and tribunal users. I am greatly encouraged when I see all the work that has been done by the tribunals since July 2020 to make remote hearings more accessible and effective, and I believe that if a further survey were carried out today the results would reflect this reality. However, the survey and its findings still hold a great deal of value for us when we are considering how we can improve even more. The report notes that lack of connectivity for some tribunal users is a difficulty we have to contend with, and we need to be conscious of the “digital poverty” that may prevent access to a remote hearing.

Though telephone and video hearings have worked well in the tribunals during the Covid-19 pandemic and have helped us maintain access to justice in this extremely testing time, we must acknowledge that for many people and in many cases they are not going to provide the best form of hearing we can offer. While the pandemic continues, remote hearings will remain an essential part of the tribunals’ ways of working, and there is no doubt that they are going to play an important part in the recovery. But we are eager to move back to in-person hearings as soon as we can in cases where that is more appropriate. And we are working with HMCTS to increase the number of in-person hearings being listed, while ensuring that our hearing rooms are safe for all tribunal users who come to them, for our staff, and for judicial office holders themselves.

I thank Dr Byrom and her team for the useful contribution they have made to our progress.

Sir Keith Lindblom

June 2021

1 Executive Summary

A. Background

- 1.1 The measures introduced to tackle the spread of COVID-19 resulted in rapid changes to the operation of courts and tribunals across England and Wales. Across the tribunals system, measures were put in place to protect public safety and ensure that tribunals were able to function and hear cases wherever possible. A range of procedural and practical changes were adopted: tribunals were encouraged to triage their caseload and to decide cases “on the papers”, the use of remote hearings was expanded and rules on party compliance with directions were relaxed to take account of the unprecedented circumstances of the pandemic.
- 1.2 Taken together, these changes constituted a significant shift in the operation of tribunals. The Senior President of Tribunals and leadership judges were keen to explore the impact of these changes on the experience of the tribunals judiciary, to identify opportunities to refine the processes put in place, and to guide future developments.¹ In order to assist them in this task, they commissioned a survey—this report presents the findings from that exercise.

B. About the survey and respondents

- 1.3 An online survey of judicial office holders was designed with the support of the Senior President of Tribunals and Chamber Presidents who reviewed and approved the final survey. This survey was distributed via email and was open to all judicial office holders who had participated in hearings between 19 March 2020 and 31 July 2020. **1507 judicial office holders completed the survey in full**—only those respondents who completed the survey in full were included in the analysis.
- 1.4 In the early stages of the research it was revealed that no central record was kept of the numbers of judicial office holders who had heard cases remotely between 19 March 2020 and 31 July 2020. The absence of this data makes it impossible to assess the response rate to the survey (i.e., how many judicial office holders who were eligible to participate in the survey chose to do so). Due to the sampling and recruitment approach adopted, the findings of this survey cannot be generalised to the wider population of judicial office holders. The research methodology and limitations are detailed at Chapter 3.

¹ The following questions were identified as being of particular interest and importance: (i.) How effective was the guidance and support provided for judges, and how might it be improved? (ii.) Who provided IT support for remote hearings and how satisfactory was this support? (iii.) How effective was the administrative support and infrastructure provided for remote hearings and how might it be improved? (iv.) How much equipment is needed to conduct remote hearings effectively? (v.) How did the different hearing platforms compare and how well did the technology used to conduct remote hearings perform? (vi.) What has been the impact of the transition to remote hearings on access to justice? (vii.) What has been the impact of the transition to remote hearings on judicial office holder morale and wellbeing?

1.5 The highest number of responses came from judicial office holders sitting in the Health, Education and Social Care Chamber, followed by the Social Entitlement Chamber and the Employment Tribunals (England and Wales). The majority of responses came from fee-paid non-legal members. The majority of respondents had completed between 1 and 20 remote hearings at the point at which they participated in the survey. 27% of responses came from judicial office holders who indicated that their base hearing centre was located in London, while 16% of respondents indicated that their base hearing centre was located in the South East of England. The vast majority of respondents (94%) reported joining hearings from their home—only a minority attended court and hearing centres to conduct hearings.

C. Findings: Guidance and support

1.6 The majority of respondents had both seen the guidance provided by HMCTS and Chamber Presidents and found it useful, but concerns were raised about the administrative and technical support provided to facilitate the conduct of remote hearings. Over one third of respondents reported that hearings proceeded without access to technical support to address IT issues. Where respondents *were* provided with administrative and IT support, the majority stated that they were satisfied with the support they received, however experience varied considerably across chambers. Only 38.9% of respondents in the Mental Health Tribunal were satisfied with the IT support for remote hearings [para 5.14].

1.7 Serious issues were reported with arrangements for accessing papers, which have been reported as generating applications to appeal. These issues were particularly acute in the Employment Tribunals in both England and Wales and Scotland. A number of common difficulties were identified [see para 5.17]—these issues should be addressed as a matter of urgency.

1.8 Respondents also raised concerns about the guidance and support provided to appellants in order to prepare them to take part in remote hearings. The dedicated support team created in the SEND jurisdiction to assist judicial office holders and parties to join hearings should be replicated across other jurisdictions.

1.9 Many respondents raised concerns about reasonable expenses (such as phone bills) not being covered by HMCTS. The survey revealed the potential for disparities (or perceived disparities) in resource provisions to generate resentment between fee-paid and salaried judges. A number of respondents raised concerns about the fitness for purpose of the existing model for remunerating fee-paid judges in the context of remote hearings. Suggestions to address concerns made by respondents included that fee-paid judges be paid a writing fee to compensate for not being paid for travel costs [paras 5.19-5.20].

D. Satisfaction with technology

- 1.10 Significant amounts of equipment are needed to conduct video hearings effectively and the laptops provided as standard by HMCTS to salaried judges may require updating to improve their processing power and the quality of the inbuilt camera. Headsets and second screens were commonly reported to be critical to the smooth conduct of remote hearings. Access to high-speed broadband is critical to enable hearings to take place effectively.
- 1.11 Satisfaction with the platforms used to conduct remote hearings was generally high (between 64.4% and 82.9%). Respondents were least satisfied with Skype for Business (only 64.5% of respondents who had used this platform described themselves as satisfied or very satisfied) and most satisfied with Zoom (82.9% of respondents who had used this platform described themselves as satisfied or very satisfied). Only 69.4% of respondents were satisfied with Cloud Video Platform—Cloud Video Platform had the second-highest percentage of dissatisfied users after Skype for Business. This may be considered worrying given that Cloud Video Platform has been chosen as the official platform for use across tribunals in England and Wales.

E. Remote hearings and access to justice I: Access to hearings

- 1.12 The impact of remote hearings on access to justice varies between and within chambers. Respondents indicated that proceeding with hearings remotely has created new practical and attitudinal barriers to accessing the justice system for some parties [para 7.9], whilst reducing them for others [para 7.8]. Respondents reported that patients in detained settings appearing before the Mental Health Tribunal have been particularly adversely affected by a lack of access to adequate equipment and broadband. Many respondents reported issues with contacting appellants on the day of their hearing, and raised concerns about the ability of appellants to access the papers necessary for their case [para 7.10].
- 1.13 The utility of remote hearings as a tool to tackle case backlogs is contested [paras 7.5-7.7]. Respondents from the SEND Tribunal reported that the introduction of remote hearings supported the reduction of the tribunal's pre-pandemic backlog through rendering it easier to convene panels. Conversely respondents from the Immigration and Asylum Tribunal reported that hearings were taking longer to conduct, creating a backlog of cases [para 7.7].
- 1.14 Whilst respondents considered that remote hearings had reduced psychological barriers to attending hearings for some, these barriers had been amplified for others: particularly those with low levels of digital literacy and confidence; English as an additional language; those on low incomes; parties experiencing mental health problems; and parties with hearing and learning difficulties. Respondents from the Mental Health Tribunal in particular reported diminished attendance at hearings by appellants [para 7.14]. In addition, lack of confidence that remote hearings provide parity of experience and outcome for parties was reported to deter some from participating [para 7.15].

F. Remote hearings and access to justice II: Participation in fair and effective hearings

- 1.15 The majority of respondents felt that telephone hearings were effective for routine procedural and case management matters, noting that tribunals were experienced in deploying telephone hearings for this purpose prior to the pandemic. In addition, telephone hearings were felt to be appropriate for dealing with short simple matters, where parties were represented [para 7.21]. In the case of video hearings, respondents felt that these worked best for short, straightforward hearings which concerned points of law, rather than live evidence. Some respondents from the Employment Tribunals (England and Wales) felt that video hearings worked well for judicial mediations. Hearings involving represented parties and professionals were felt to be most suited to video hearings, although respondents observed that much depended on the quality of broadband and technology available to parties [para 7.22].

F.1. Identifying vulnerability and making adjustments

- 1.16 The Equal Treatment Bench Book affirms that identifying and making adjustments for disabilities or other disadvantage is critical to facilitating full and effective participation.² Nearly half of respondents (44.9%) who had conducted audio (telephone) hearings felt that it was difficult to identify when parties were vulnerable and may require reasonable adjustments. This figure dropped in the context of video hearings, where just over one third of respondents (34.5%) who had conducted video hearings stated that they found it difficult to identify when parties were vulnerable and required adjustments [para 7.25].
- 1.17 A majority of respondents reported that proceeding with hearings remotely had forced judges to rely to a greater extent on the information contained within papers or provided by legal representatives. Where this information was not supplied, or the party was unrepresented, respondents reported that it was very difficult to identify when a party was at a disadvantage [para 7.27]. Respondents reported that judicial office holders had to take a proactive role in identifying vulnerability and disadvantage in remote hearings, and to work harder to establish rapport in the early stages of hearings to facilitate this [para 7.30]. Some respondents reported that the fact that some parties were more relaxed when able to join hearings from their own home actually masked their vulnerability, making it harder for judges to identify and address barriers to participation.
- 1.18 For those respondents who reported that they had found it difficult to identify when parties were distressed or disadvantaged during video hearings, a majority attributed this to issues with the technology used to conduct hearings. Respondents reported that poor picture quality and audio made it difficult to identify when parties were struggling, undermining the potential for video

² See Judicial College (2018) "Equal Treatment Bench Book" (March 2020 Revision) London p. 4. Available at: <https://www.judiciary.uk/wp-content/uploads/2020/05/ETBB-February-2018-amended-March-2020-17.09.20-1.pdf>.

hearings to address the issues experienced in telephone hearings. Further to this, respondents reported that even where parties did have a good video connection, a combination of the camera focusing on the speaker, and the requirement to conduct multiple tasks simultaneously (such as taking notes and alternating between windows) meant that parties would not always be visible to the tribunal panel, making it difficult to monitor parties' reactions [para 7.36].

- 1.19 The overlap between parties who were likely to be vulnerable or disadvantaged, and those with reduced access to technology was cited as exacerbating issues with identifying and monitoring distress and vulnerability. Respondents reported that parties with inadequate access to broadband and technology were often forced to join their video hearing by telephone, making it impossible to monitor visual cues.
- 1.20 These issues were magnified in the Mental Health Tribunal, where inadequate technology and equipment, low access to broadband and the withdrawal of pre-hearing examinations impacted on the ability of tribunal members to identify vulnerability. Further to this, once vulnerable patients were identified, the circumstances of the pandemic made it difficult to put in place effective adjustments that would enable patients to participate [paras 7.38-7.44]. A number of respondents reported that proceeding with hearings remotely had exacerbated the patient's pre-existing symptoms and created risks for staff who were facilitating attendance [paras 7.45-7.48].

F.2. Remote hearings and levels of legal representation

- 1.21 Representatives can play a key role in supporting the tribunal to identify when parties are vulnerable and may require reasonable adjustments to participate. A majority of respondents also reported that hearings where parties are represented are easier to conduct remotely. For this reason, understanding the impact of the rapid expansion of remote hearings on the number of parties who are represented is of critical importance.
- 1.22 Across all chambers, the majority of respondents reported that the number of parties who are represented by a lawyer or advice worker was unaffected by the transition to remote hearings. 75.2% of respondents ($n=1393$) reported that they had observed no difference in the number of parties who were represented in telephone hearings, and 86.9% of respondents ($n=968$) reported that they had observed no difference in the number of parties who were represented in video hearings. A minority of respondents in the Immigration and Asylum Chamber (where respondents reported that levels of representation are normally high) stated that the number of parties who were represented had risen in light of the transition to remote hearings, as representatives found it easier to attend [paras 7.51-7.52].
- 1.23 Reductions in levels of representation in telephone hearings were reported in those chambers where parties tend to rely on representation from charities and advice agencies. 43.5% of respondents from the Social Entitlement Chamber ($n=490$) reported that the transition to telephone hearings had

resulted in fewer appellants being represented. This was attributed to the financial impact of the pandemic on advice agencies, and the fact that advice agencies were not equipped to provide legal advice and representation remotely [paras 7.54-7.58].

F.3. Remote hearings and effective communication

- 1.24 The Equal Treatment Bench Book defines “effective communication” as a process through which “everyone involved [in the legal process] understands and is understood...Understanding means understanding the evidence, the materials, the process, the meaning of questions and the answers to them.”³ In the absence of effective communication, the Equal Treatment Bench Book argues, “the legal process will be impeded or derailed”.⁴
- 1.25 Overall, nearly half of respondents (46.6%, *n*=1371) reported that it was easy or very easy to communicate with parties during telephone hearings. The proportion of respondents who reported that it was very easy or easy to communicate with parties fell slightly in the context of video hearings, to 41.2% (*n*=1036). However, over one quarter of respondents reported that it was difficult or very difficult to communicate with parties during telephone hearings (28%, *n*=1371), and nearly one third of respondents stated that it was difficult or very difficult to communicate with parties during video hearings (31.7%, *n*=1036). Respondents reported that the rapid expansion of remote hearings impacted both positively and negatively on the technical, practical and psychological barriers to communication between parties and judicial office holders.
- 1.26 Experiences diverged significantly between and within chambers. Overall, the highest proportion of respondents who found it difficult or very difficult to communicate with parties during telephone and video hearings reported sitting in the Health, Education and Social Care Chamber (although experience varied considerably between those who sat in the SEND Tribunal and those who sat in the Mental Health Tribunal).
- 1.27 Difficulties with communication were attributed to both practical [paras 7.62-7.65 and 7.69-7.71] and psychological barriers [paras 7.66-7.68 and 7.72-7.73] created by the transition to remote hearings. Practical barriers were created by the practice of judges “muting” participants, low-quality technology, impairments in the interpretation process and restricted access to broadband. Psychological barriers were created by the reduced ability to establish rapport with appellants, and by the increased range of tasks required of judicial office holders in a virtual hearing environment: the requirement on the judge to monitor the virtual hearing environment could distract them from attending to parties’ needs in the same manner that they would be able to in a physical hearing.

³ Judicial College (2018) “Equal Treatment Bench Book” (March 2020 revision) p. 4. Available at: <https://www.judiciary.uk/wp-content/uploads/2020/05/ETBB-February-2018-amended-March-2020-17.09.20-1.pdf>.

⁴ *ibid.*

- 1.28 The practical and emotional advantages and disadvantages of remote hearings in terms of promoting communication were magnified in the experience of respondents from the Health, Education and Social Care Chamber. Overall, 40.9% ($n=579$) of respondents from this chamber reported that they found it difficult or very difficult to communicate with parties during telephone hearings, and 39.7% ($n=648$) of respondents found it difficult or very difficult to communicate with parties during video hearings.
- 1.29 This overall figure masked significant divergences in experience between respondents in the SEND Tribunal and those in the Mental Health Tribunal. In the SEND Tribunal, the percentage of respondents who found it difficult or very difficult to communicate with parties in telephone hearings was just 16.9%, compared with 46.3% in the Mental Health Tribunal. Similarly, just 15.6% of respondents in the SEND Tribunal reported that they found it difficult to communicate with parties during video hearings, compared with 44.5% of respondents in the Mental Health Tribunal. The reasons for this are explored in detail at paras 7.74-7.89.

F.4. Video hearings and the ability of parties to effectively put their case

- 1.30 Overall, 57.6% ($n=961$) of respondents reported that video hearings were mostly effective or effective in enabling parties to participate and put their case effectively. Nearly one third of respondents across all chambers (31.9%, $n=961$) stated that in their experience video hearings were slightly ineffective or ineffective in this regard [paras 7.90-7.93]. Respondents from the Tax and Chancery Chamber, which had the highest proportion of respondents who indicated that video hearings were mostly effective or effective, tended to report that this was because they had dealt mainly with professional and represented parties (see Figure 7.13 below).
- 1.31 As above, the Health, Education and Social Care Chamber contained the highest proportion of respondents who reported that video hearings were slightly ineffective or ineffective in enabling parties to present their case (37.2%, $n=640$). In the context of video hearings, perceptions of efficacy varied between respondents from the SEND Tribunal and those from the Mental Health Tribunal. In the SEND Tribunal, over two-thirds of respondents (70.6%, $n=82$) reported that video hearings were effective or mostly effective in terms of supporting parties to participate and put their case, compared with only half of respondents in the Mental Health Tribunal (50.4%, $n=513$).
- 1.32 Many of the factors that were described as impacting negatively on communication were also referenced by respondents in explaining why they felt that video hearings were ineffective or slightly ineffective in terms of enabling parties to participate and put their case effectively. However, within the responses provided, new and additional themes were identified. These included: (i.) the impact of video hearings on the ability of parties to communicate with their representatives during hearings [paras 7.94-7.95]; (ii.) the rigid structure imposed on video hearings to manage their tendency to overrun undermining the flexibility that was normally deployed to enable parties to present their case [para 7.96]; (iii.) the impact on supporter attendance [para 7.97]; and (iv.) the informality trap—the

tendency for parties to perceive video hearings as less formal and therefore not present their case as effectively [paras 7.98-7.99].

F.5. Remote hearings and fair decisions in accordance with law

- 1.33 A fair and effective hearing requires both individuals presenting evidence to be able to make their case and the decision maker to be able to comprehend it. As such, any evaluation of the impact of the expansion of remote hearings on access to justice must consider the effect of changing the mode of hearing on judicial decision making. A number of respondents expressed concerns that the rapid transition to remote hearings (both telephone and video) had made arriving at a fair decision harder [paras 7.100-7.103]. In explaining their concerns, respondents implicated distractions caused by technical difficulties, reduced ability to discern non-verbal clues and indicators, and the impact of remote hearings on intra-panel discussions.

F.6. The impact of remote hearings on parties' perceptions of fairness

- 1.34 A number of respondents expressed concerns that it was more difficult to ensure that parties feel they have had a fair hearing in the context of proceeding remotely. This was attributed to: issues with the technology, which it was felt undermined perceptions of the professionalism and fairness of hearings; the inability of parties to see the panel, which undermined both the ability of the panel to demonstrate that they were treating the appellant with dignity and fairness, and made it harder for parties to trust the motives of the panel; and the absence of a "neutral" hearing room. Respondents stated that the absence of a neutral hearing room was felt to increase the ability for parties to perceive disparities between their socio-economic circumstances and those of opponents or judicial office holders, and raised concerns that this might lead parties to question the motives of judges and perceive the overall hearing as less fair [paras 7.104-7.108]. A number of respondents highlighted the need to conduct research to examine the experience of parties.

G. The impact of remote hearings on judicial wellbeing

- 1.35 The rapid transition to remote hearings has impacted negatively on the wellbeing of the majority of judicial office holders who responded to this survey. Explanations for this included that remote hearings had changed the role of judicial office holders in hearings by i.) making them responsible for managing technical difficulties and increasing the administrative burden placed on judges; ii.) rendering existing skills and techniques for managing hearings less useful; and iii.) making it harder to control proceedings. Remote hearings had also introduced new concerns, such as worries about interference with witnesses and parties.
- 1.36 Whilst some respondents welcomed the reductions in travel time, and the fact that proceeding with hearings remotely had enabled fee-paid judges to continue earning during the pandemic, many reported missing the social aspect of engagement with fellow panel members. Concerns were also raised about the potential for arrangements surrounding remote hearings to foster resentment between fee-paid and salaried judges.

1.37 A majority of respondents reported that remote hearings were more tiring than hearings conducted in person. This was attributed to: i.) the propensity for remote hearings to increase the length of hearings; ii.) the increased levels of concentration required; and iii.) the stress associated with managing the technology alongside managing the hearings.

H. Recommendations

1	Improving guidance and support for judicial office holders
1.1	Guidance should be consolidated in one place and version control should be improved to enable judicial office holders to keep track of updates. Guidance should not be emailed as this makes it difficult to keep track of the latest version.
1.2	Guidance should include chamber-specific case studies and practical examples to illustrate good and bad practice.
1.3	Guidance authors should clearly distinguish between instructions, guidance, and hints and tips
1.4	More information should be provided about how to deal with common practical and procedural problems, for example, how to manage difficulties with interpreters, dealing with missing evidence etc.
1.5	Chamber specific precedents/scripts for conducting video and audio hearings should be created, and more detailed guidance on hearing etiquette and how to allocate time within remote hearings should be provided.
1.6	The consistency of guidance and practice across different hearing centres should be improved, and a consistent role for administrative staff should be created, e.g. specifying who will confirm case reference numbers and record start and finish times.
1.7	Specific guidance relating to the use of interpreters, and how to manage in the absence of simultaneous interpretation should be provided.
1.8	Concerns raised regarding disparities in resource provisions between fee-paid and salaried judges should be investigated.
1.9	Steps should be taken to monitor the impact of the increased administrative burden of remote hearings on judicial wellbeing.
2.	Improving guidance and support for parties
2.1	HMCTS should improve the guidance and support provided to parties, particularly those who may be considered vulnerable. HMCTS should institute a pre-hearing checklist for parties, which should be completed prior to the commencement of the hearing.
2.2	The pre-hearing checklist should include: <ul style="list-style-type: none"> • Checking that the parties have their papers and are able to access them during the hearing; • Checking that all parties understand how to connect to the hearing; • Checking that both the equipment and connection is of a suitable standard to facilitate effective participation; • Identifying vulnerability and whether there is a requirement for reasonable adjustments; • Checking that parties understand and are capable of following the instructions regarding hearing etiquette;

	<ul style="list-style-type: none"> • Checking that parties understand the purpose of the hearing.
2.2	The role of the dedicated support team created by judicial office holders in the SEND jurisdiction was highlighted as an example of best practice [see para 5.12]. The functioning of this team should be reviewed and, the model it provides replicated across other tribunals
3.	Access to papers
3.1	Arrangements for providing access to papers should be urgently reviewed, to ensure that all parties and judicial office holders are able to access them in a timely fashion.
3.2	<p>Quality control measures should be introduced to address delays in hearings caused by issues with the bundles. Checks to be adopted should include the following</p> <ul style="list-style-type: none"> • Checks should be introduced to ensure that all key documents have been scanned and included in the file; • Bookmarks should be included to aid navigation of large files; • E-bundling and PDF software should be made available to fee-paid judges; • Issues with DOM-1 machines that act as a barrier to remote access to online databases should be addressed:
3.3	The adoption of the digital case management system should be expedited.
4.	Technology—Hardware
4.1	<p>Judicial office holders tasked with conducting remote hearings should be provided with:</p> <ul style="list-style-type: none"> • second screens, • headsets, • access to additional devices for viewing papers (such as iPads), • access to a high-speed internet connection.
5.	Technology—Platforms
5.1	HMCTS should examine the issues reported with BT MeetMe around poor-quality audio; cumbersome dialling in process; problems in recording hearings, and the lack of notification when a party leaves a call.
5.2	HMCTS should review the stability of Cloud Video Platform to investigate and identify the cause of the issues identified regarding participants “freezing” and “dropping out”.
5.3	<p>The following changes should be made to the functionality of Cloud Video Platform:</p> <ul style="list-style-type: none"> • The platform should be adapted to show larger pictures of attendees, and include the functionality to enable JOH’s to view all participants on the screen at once; • The platform should support wider angles, and the ability to see more than a head and shoulders view of parties; • A private virtual waiting room should be added to facilitate pre-hearing discussions between parties;

	<ul style="list-style-type: none"> • A mechanism should be added to enable panel members to speak to each other confidentially during hearings; • Subtitles/real time speech-to-text facility should be added to enable speakers to be understood and support those with hearing difficulties to participate in hearings; • The panel should be adapted to improve the ability to reliably join interpreters and a “pinning” function to enable them to be seen by the panel; • A mechanism should be added to facilitate document sharing in real time; • The platform should offer functionality to present a neutral background.
5.4	Colleagues in Scotland should be contacted to explore their experience with an alternative platform, with a view to identifying improvements that might be made to Cloud Video Platform.
5.5	The leadership judges should set/recommend a minimum threshold for technical performance below which the fairness and efficacy of hearings is threatened to ensure consistency. E.g. maximum number of interruptions permitted
6.	Access to justice I—Remote hearings and accessing tribunals
6.1	HMCTS staff should review their approach to providing papers to parties to ensure all parties are able to access them in a timely fashion prior to their hearing.
6.2	HMCTS staff should work proactively to identify and provide support to appellants who: <ul style="list-style-type: none"> • Are likely to be on low incomes without access to equipment, phone credit or broadband; • Are experiencing mental health or learning difficulties; • Have English as a foreign language; • Are hard of hearing or deaf, or who have impaired sight or difficulties with speech and language; • Are in detained settings, such as mental health care facilities, immigration detention centres and prisons.
6.3	Checks should be conducted to ensure that patients in detained mental health settings are able to access the technology and broadband required to participate in remote hearings. Hospitals should be asked to ensure that patients are able to join hearings from a quiet room and via a device that is not shared, and have access to writing materials to take notes.
7.	Access to justice II—Fair and effective hearings
7.1	Leadership judges should issue guidance that telephone hearings should be reserved for routine procedural and case management matters where parties are represented.
7.2	Leadership judges should issue guidance that video hearings should be reserved for: <ul style="list-style-type: none"> • Short, straightforward hearings concerning points of law; • Hearings not involving live evidence; • Hearings where all parties are represented and are joining with their representative. • Hearings where all parties have access to good broadband and adequate technology.
7.3	Leadership judges should issue guidance that remote hearings (both telephone and video) should be used with caution where:

	<ul style="list-style-type: none"> • Hearings are long; • Factual matters are in dispute; • Issues of credibility are engaged; • There are multiple participants and witnesses; • Parties are unrepresented; • Parties require the assistance of an interpreter; • Parties experience physical or mental health difficulties, including hearing loss; • Issues are highly contested.
7.4	This guidance should remain in place until independent research conducted with a representative sample of tribunal users has been conducted. This research should be designed in such a way as to explore the impact of remote hearings on outcomes for tribunal users.
8.	Data collection
8.1	Data should be routinely collected on the number of judges who preside over tribunal hearings during any given period. This data should be collected in such a manner to enable leadership judges to re-contact those judges who have sat for the purposes of monitoring and research.
8.2	Management information collected by HMCTS should include capturing information on the mode by which hearings are taking place. The following descriptions are suggested: <ul style="list-style-type: none"> • Fully video: where all parties attend by video; • Partly video: where some parties attend by video whilst others attend in person; • Fully audio: where all parties attend by telephone; • Partly audio: where some parties attend by telephone and others attend in person.
8.3	Data on the duration of hearings should be recorded to model the impact of remote hearings on backlogs.
8.4	The platform used should also be routinely recorded. A full list of data that should be captured by HMCTS on an ongoing basis to facilitate better understanding of the impact of remote hearings on access to justice, judicial wellbeing and to support leadership judges to plan is presented at Appendix B. HMCTS should be asked to complete the data audit template at Appendix B to confirm which of this data is already captured
9.	Further research
9.1	A panel survey should be commissioned to explore changes in the experience of a representative sample of tribunal judges over time.
9.2	Research should be conducted to investigate whether a decrease in representation is a consequence of representatives refusing to take part in hearings and advising clients to do the same on the basis of concerns about the fairness of hearings conducted by telephone.
9.3	As a matter of urgency, independent research should be conducted with a representative sample of tribunal users to explore the impact of remote hearings on perceptions of fairness and outcomes for tribunal users.

2 Introduction

A. Overview

2.1 The measures introduced to tackle the spread of COVID-19 resulted in rapid changes to the operation of courts and tribunals across England and Wales. Across the tribunals system, measures were put in place to protect public safety and ensure that tribunals were able to function and hear cases wherever possible. This chapter describes the key procedural and practical changes that were adopted in response to the pandemic and the variation in practice between different chambers. The chapter concludes by setting out the key questions prompted by these new arrangements, which this research aims to address.

B. Procedural changes

2.2 Whilst existing procedure rules for tribunals already allowed for significant flexibility in the methods that could be deployed to conduct hearings, additional amendments were introduced under the Tribunal Procedure (Coronavirus) (Amendment) Rules 2020 to enable tribunals to adapt to the new circumstances.⁵

2.3 On 19 March 2020, the then Senior President of Tribunals, Sir Ernest Ryder published a new pilot practice direction, “Contingency Arrangements in the First-Tier and the Upper Tribunal”⁶ pursuant to section 3 of the Tribunals, Courts and Enforcement Act 2007. This practice direction was issued initially for six months, with options to renew or revoke at any time should it become inappropriate or unnecessary. It applied across all chambers of the First-Tier and Upper Tribunals. The pilot practice direction was amended and extended until March 2021 by the new Senior President of Tribunals, Sir Keith Lindblom, on 14 September 2020.⁷

2.4 The key changes introduced by the 19 March 2020 pilot practice direction were as follows:⁸

2.4.1 **Encouraging the use of decisions on the papers without a hearing:** for chambers where decisions on the papers are permitted, these were encouraged, subject to (i.) the overriding

⁵ UK Government. The Tribunal Procedure (Coronavirus) (Amendment) Rules 2020. *Legislation*. April 2020. <https://www.legislation.gov.uk/uksi/2020/416/contents/made>.

⁶ Senior President of Tribunals (19 March 2020) “Pilot Practice Direction: Contingency Arrangements in the First-Tier Tribunal and the Upper Tribunal.” Available at: <https://www.judiciary.uk/wp-content/uploads/2020/03/General-Pilot-Practice-Direction-Final-For-Publication-CORRECTED-23032020-1.pdf>.

⁷ Senior President of Tribunals (14 September 2020) “Amended General Pilot Practice Direction: Contingency Arrangements in the First-Tier Tribunal and the Upper Tribunal.” Available at: <https://www.judiciary.uk/wp-content/uploads/2020/09/15-Sept-20-SPT-Amended-General-Pilot-Practice-Direction.pdf>.

⁸ E. Fitzsimons (2020) “COVID-19: Implications for Statutory appeals in the First-Tier and Upper Tribunal (Immigration and Asylum Chamber)” *Garden Court Chambers Blog*, Thursday 11 June 2020. Available at: <https://www.gardencourtchambers.co.uk/coronavirus-legal-news-views/covid-19-implications-for-statutory-appeals-in-the-first-tier-and-upper-tribunal-immigration-and-asylum-chamber>

objective, (ii.) the relevant procedure rules on notice and consent and (iii.) the parties' rights as protected by the European Convention on Human Rights.

2.4.2 **Increasing the role of triage:** all jurisdictions were encouraged to triage their caseload and to try, where possible, to make decisions on the papers.

2.4.3 **Extending the use of remote hearings and hearings in the absence of parties:** the pilot practice direction encouraged the use of remote hearings where their conduct was reasonably practicable and in accordance with the overriding objective. Provisions were also made for hearings in a party's absence, where a party fails to attend without an application to adjourn being made in advance.

2.4.4 **Relaxing rules on party compliance to take account of the circumstances created by the pandemic:** Tribunals were required to have regard to the impact of COVID-19 when considering applications for extensions of time for compliance with directions.

C. Practical adaptations

2.5 In response to the nationwide lockdown measures, Her Majesty's Courts and Tribunals Service ("HMCTS") temporarily closed around half of their buildings to the public, although some buildings remained open to staff and judiciary. In the early period of lockdown, all in-person hearings were suspended, and buildings did not begin to re-open to the public until May 2020.⁹

2.6 Steps were quickly taken to expand the use of technology in order to allow as many hearings as possible to take place remotely.¹⁰ HMCTS increased audio and video technology capability and began rolling out 'Cloud Video Platform' (CVP) software for use in tribunal hearings.¹¹ Some tribunals were able to access CVP before others, for example, video hearings using CVP were not made available in Social Security and Child Support Tribunals until June 2020.¹²

2.7 Published accounts of the early period of the pandemic have referenced the significant administrative challenges faced by many chambers. Document management has been noted as one of the greatest challenges in adapting to remote working, as tribunals operated on a largely paper-based system pre

⁹ R. Buckland "Courts and tribunals recovery update: Written statement HCWS329". *UK Parliament*. July 2020. <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-07-01/HCWS329/>.

¹⁰ See: Courts and Tribunals Judiciary. "Courts and tribunals recovery" July 2020. Available at: <https://www.judiciary.uk/announcements/courts-and-tribunals-recovery/>; and HM Courts & Tribunals Service. "COVID-19: Overview of HMCTS response" July 2020.

¹¹ *ibid.*

¹² Disability Rights UK "Video hearings to be made available for Social Security and Child Support Tribunals" June 2020. <https://www.disabilityrightsuk.org/news/2020/june/video-hearings-be-made-available-social-security-and-child-support-tribunals>.

pandemic.¹³ The ability of offices to deal with correspondence and proceedings was reduced, due to staff working remotely and having smaller teams on site.¹⁴ Staff had to adapt to undertaking tasks usually performed by others in order to ensure continued access to justice.

- 2.8 Over 150 buildings remained open throughout the pandemic to conduct essential face-to-face hearings. The most urgent cases were prioritised for oral hearings by tribunals judiciary, for example those relating to issues of safeguarding, detention and destitution.¹⁵

D. Variation across chambers

- 2.9 Assessing the impact of COVID-19 arrangements on the tribunals system as a whole is complicated by the considerable variation in context and practice across the different chambers. Different chambers vary considerably in terms of the vulnerability of parties involved in hearings, the location of parties (for example, in the Immigration and Asylum Chamber and the Mental Health Tribunal, parties may be in detained settings) and the proportion of parties who represent themselves in proceedings. Employment Tribunals and Immigration and Asylum Chambers have been described as having “peculiarly adversarial and different procedural protections”¹⁶ whereas tribunal hearings in the Social Entitlement Chamber are frequently described as being inquisitorial in nature.¹⁷ Larger tribunals have dedicated tribunal centres and administrative support.¹⁸ In relation to open justice, chambers have different conventions regarding whether hearings are conducted in public or in private, and whether or not hearings are formally recorded. In reflection of this diversity, findings from the survey are presented at chamber level throughout the remainder of the report.

E. Key questions arising from changes

- 2.10 The arrangements put in place to respond to COVID-19 constituted a significant shift in the operation of tribunals. With this in mind, leadership judges were keen to explore the impact of these changes on the experience of the tribunals judiciary, to identify opportunities to refine the processes

¹³ B. Campbell “A period of adjustment - how employment tribunals are responding to COVID-19 and how we can be best placed to help them” *Brodies LLP*. June 2020. <https://brodies.com/insights/employment-and-immigration/employment-tribunal-hearings-during-the-covid-19-pandemic/>

¹⁴ Judge Greg Sinfield “Announcement of reduction in service in the First-tier Tribunal tax chamber administrative centre” April 2020.

¹⁵ See: Administrative Justice Council “Meeting Minutes” July 2020 and Courts and Tribunals Judiciary “Ensuring patients can access justice” May 2020. <https://www.judiciary.uk/announcements/ensuring-patients-can-access-justice/>

¹⁶ Sir Ernest Ryder (2020) “The Senior President of Tribunals Annual Report 2020” p. 7. Available at: https://www.judiciary.uk/wp-content/uploads/2020/07/6.6755_The-Senior-President-of-Tribunals-Annual-Report-2020_WEB-CS-amend-1.pdf.

¹⁷ R. Thomas (2016) “Current Developments in UK Tribunals- Challenges for Administrative Justice” p. 4. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2766982.

¹⁸ *ibid.*

put in place to guide future developments. Leadership judges worked with the research team to design a survey that would address the following questions:

- 2.10.1 How effective was the guidance and support provided for judges, and how might it be improved?
- 2.10.2 Who provided IT support for remote hearings and how satisfactory was this support?
- 2.10.3 How effective was the administrative support and infrastructure provided for remote hearings and how might it be improved?
- 2.10.4 How much equipment is needed to conduct remote hearings effectively?
- 2.10.5 How did the different hearing platforms compare and how well did the technology used to conduct remote hearings perform?
- 2.10.6 What has been the impact of the transition to remote hearings on access to justice?
- 2.10.7 What has been the impact of the rapid transition to remote hearings on judicial office holder wellbeing?
- 2.11 The following report presents the findings from this survey and attempts to address the key questions posed by the tribunals judiciary leadership.

3 Methodology and approach

A. Overview: How was data collected?

3.1 Data on the impact of COVID-19 on tribunal hearings was collected via two mechanisms:

3.1.1 A literature review was undertaken to frame the findings and identify key issues.

3.1.2 An online survey of Judicial Office Holders was designed with the support of the Senior President of Tribunals and Chamber Presidents who reviewed and approved the final survey. This survey was distributed via email to all Judicial Office Holders who had participated in hearings between 19 March 2020 and 31 July 2020.

B. Understanding the context and framing the findings

3.2 A literature review was conducted to frame the findings of the survey and identify key issues for exploration in the analysis. The purpose of the literature review was to gather published accounts of the changes that occurred in the tribunal system since the onset of the Covid-19 pandemic and their impact. The full literature review, which was conducted by Sarah Beardon, is available at Appendix A. The literature review was used to augment the findings presented in the remainder of the report.

C. The online survey

3.3 The primary method of data collection was via an online survey. The survey questions were designed by the research team and approved by the Senior President of Tribunals and Chamber Presidents at a meeting of the Tribunals Judicial Executive Board. A copy of the survey is available at Appendix B.

3.4 The survey was disseminated via email: Chamber Presidents were asked to identify all those judicial office holders who had presided over hearings between 19 March 2020 and 29 June 2020. 1507 judicial office holders completed the survey in full—only those respondents who completed the survey in full were included in the analysis.

D. Limitations

3.5 In the early stages of the research it was revealed that **no record was kept of the numbers of judicial office holders who had heard cases remotely during the COVID-19 period**. The absence of this data makes it impossible to assess the response rate to the survey (i.e. how many judicial office holders who were eligible to participate in the survey chose to do so). This makes it much more difficult to gauge the accuracy of the findings. For example, if all of the judges who were eligible to participate in the survey chose to do so we could be confident that the findings accurately represented the experience of judicial office holders. If 80% of eligible judicial office holders responded, we could likewise be fairly confident that the respondents were not atypical of the wider population of judicial office holders.

- 3.6 The absence of records on the number of judicial office holders who presided over remote hearings during the COVID-19 restrictions made it impossible to construct a sampling strategy that would have enabled the construction of a representative sample of judicial office holders. Respondents were recruited through a snowball sampling method—as such the judicial office holders who responded cannot be said to be representative of the wider population of tribunal judges.
- 3.7 The survey captured the experience of judges at a fairly early stage in the adoption of remote hearings—three months after the changes were introduced. As is discussed in below in Chapter 4, the majority of respondents to the survey reported that they only had experience of conducting between 1-20 remote hearings at the point at which they responded to the survey. Ideally a panel survey approach should be adopted to test changes in respondents’ perceptions over time.

4 Findings: About the respondents

A. Overview

4.1 In total, 1507 judicial office holders completed the survey. The highest number of responses came from judicial office holders sitting in the Health, Education and Social Care Chamber, followed by the Social Entitlement Chamber and the Employment Tribunals (England and Wales). The majority of responses came from fee-paid non-legal members. The majority of respondents had completed between 1 and 20 remote hearings at the point at which they participated in the survey. 27% of responses came from judicial office holders who indicated that their base hearing centre was located in London, while 16% of respondents indicated that their base hearing centre was located in the South East of England. The vast majority of respondents (94%) reported joining hearings from their home—only a minority attended court and hearing centres to conduct hearings.

B. Respondents by jurisdiction

4.2 As Figure 4.1 below demonstrates, the highest number of responses came from judicial office holders sitting in the Health, Education and Social Care Chamber. Overall, the majority of responses to the survey came from fee-paid non-legal members.

	Fee-paid judge	Fee-paid non-legal member	Salaried judge	Salaried specialist member	Grand Total
Administrative Appeals Chamber	-	4	12	-	16
Employment Tribunals (England and Wales)	39	6	81	-	126
Employment Tribunals (Scotland)	3	1	12	1	17
General Regulatory Chamber	-	-	-	1	1
Health, Education and Social Care Chamber	221	389	41	19	670
Immigration and Asylum Chamber	1	-	75	-	76
Lands Chamber	1	-	4	2	7
Property Chamber	14	11	15	1	41
Social Entitlement Chamber	148	303	23	12	486
Tax and Chancery Chamber	19	9	11		39
War Pensions and Armed Forces Compensation Chamber	7	18	2	1	28
Grand Total	453	741	276	37	1507

Figure 4-1: Respondents by chamber and role

C. Location of respondents

	London	Midlands	North East England	North West England	Northern Ireland	Scotland	South East England	South West England	Wales
Administrative Appeals Chamber	85.7%	-	-	7.1%	-	7.1%	-	-	-
Employment Tribunals (England and Wales)	23.8%	11.9%	6.3%	10.3%	-	-	26.2%	11.9%	9.5%
Employment Tribunals (Scotland)	-	-	-	-	-	100.0%	-	-	-
General Regulatory Chamber	-	-	-	-	-	-	100.0%	-	-
Health, Education and Social Care Chamber	23.9%	19.3%	12.5%	16.0%	-	0.6%	17.6%	9.5%	0.6%
Immigration and Asylum Chamber	63.2%	11.8%	10.5%	2.6%	1.3%	5.3%	1.3%	-	3.9%
Lands Chamber	71.4%	28.6%	-	-	-	-	-	-	-
Property Chamber	61.0%	7.3%	2.4%	4.9%	-	-	19.5%	4.9%	-
Social Entitlement Chamber	16.0%	0.4%	21.6%	19.3%	-	18.9%	17.5%	4.7%	1.4%
Tax and Chancery Chamber	71.1%	5.3%	-	13.2%	2.6%	2.6%	-	5.3%	-
War Pensions and Armed Forces Compensation Chamber	68.0%	4.0%	12.0%	-	4.0%	-	4.0%	8.0%	-
Grand Total	26.9%	10.7%	13.9%	14.9%	0.2%	8.1%	16.4%	7.1%	1.8%

Figure 4-2: Location of respondent base bearing centre (n=1507)

D. Experience of respondents with remote hearings

4.3 In order to gauge the experience of respondents with remote hearings, respondents were asked to indicate the approximate number of remote hearings they had completed since 19 March 2020. As Figure 4.3 below demonstrates, the majority of respondents to the survey had completed between 1 and 20 remote hearings at the point at which they participated in the survey.

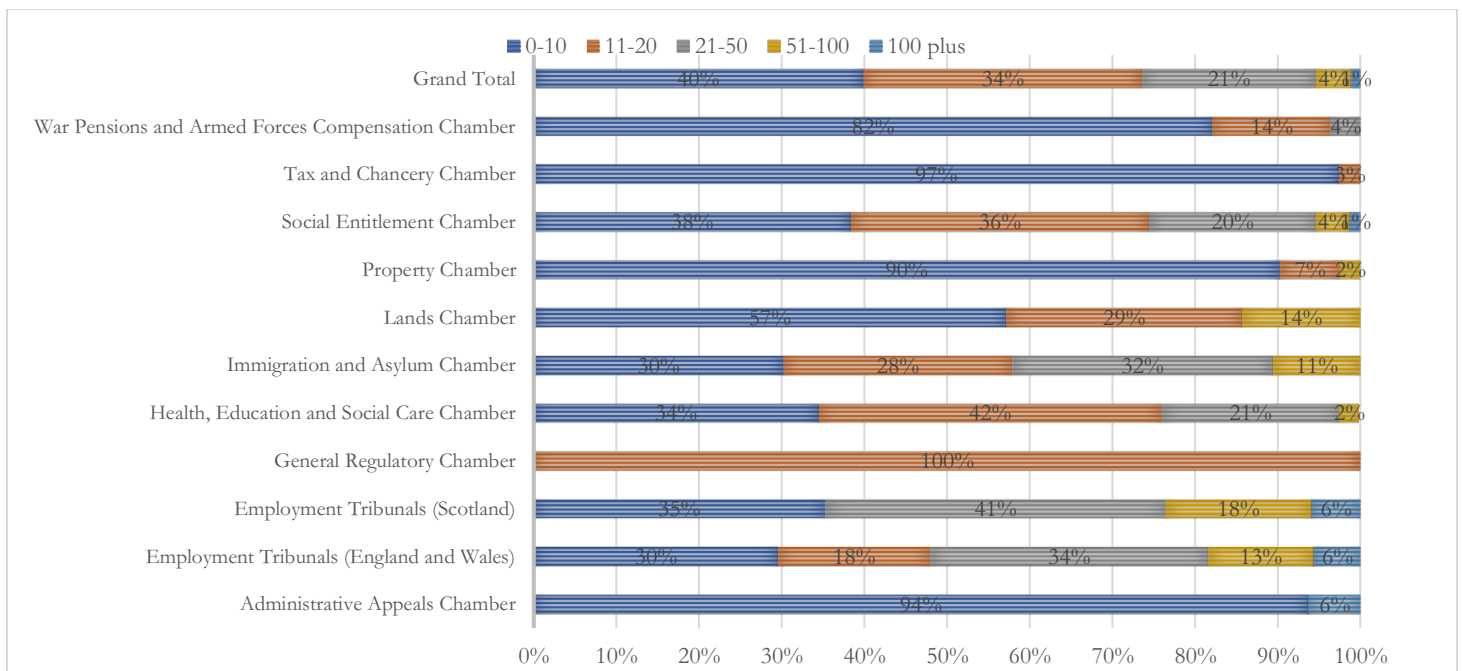


Figure 4-3: Respondent experience with remote hearings, n=1502

4.4 Respondents were asked to indicate which methods they had used to hear cases remotely since lockdown began.¹⁹ The majority of respondents reported that they had used up to two methods to hear cases (66%, n=1500). The majority of those who had only used one method to hear cases (58.8%, n=1500) sat in the Social Entitlement Chamber. Respondents sitting in the Health, Education and Social Care Chamber reported having experience of using the widest range of methods to hear cases—of those respondents who indicated that they had used all four methods to hear cases, 89.8% sat in the Health, Education and Social Care Chamber.

E. Location when joining hearings

4.5 The majority of respondents reported joining hearings from their home (94.3%, n=1502). Only a minority had joined hearings from a Courts and Tribunals Hearing Centre (10.9%, n=1502).

¹⁹ The options provided were “fully audio hearings, where all parties join by telephone, partly audio hearings, where some parties join by telephone, fully video hearings, where all parties join by video and partly video hearings, where some parties join by video”.

	Home	Professional office	Tribunals Hearing Centre	Other (please specify)
Administrative Appeals Chamber	11		6	1
Employment Tribunals (England and Wales)	108	3	64	2
Employment Tribunals (Scotland)	16		4	1
General Regulatory Chamber	1			
Health, Education and Social Care Chamber	650	23	7	5
Immigration and Asylum Chamber	51	1	45	2
Lands Chamber	6		3	
Property Chamber	37	2	6	
Response	1	1	1	1
Social Entitlement Chamber	471	9	23	6
Tax and Chancery Chamber	38	2	4	
War Pensions and Armed Forces Compensation Chamber	27	1	1	
Grand Total	1417	42	164	18

Figure 4-4: Location from which hearings were joined (n=1502—please note that respondents were able to select multiple locations)

- 4.6 Whilst most respondents reported joining hearings from only one location (91.2%, n=1502) a minority of respondents reported joining hearings from two or three separate locations (8.8%, n=1502). Respondents from the Employment Tribunals (England and Wales) were most likely to report joining from multiple locations: 38.9% of respondents from this chamber stated that they had joined hearings from two or three locations (n=1502).
- 4.7 The majority of respondents stated that they had joined hearings from their home to comply with COVID-19 restrictions, in accordance with directions provided by Chamber Presidents or in order to discharge childcare responsibilities.
- 4.8 Those respondents who reported joining from Courts and Tribunals Hearing Centres gave a number of reasons for their decision. Many respondents cited the practical benefits of joining from a Courts and Tribunals Hearing Centre, stating that joining from this location improved their ability to communicate with administrative staff, afforded them improved access to technology and broadband, and enabled them to have access to a full range of office facilities including printing. Other respondents reported that they had joined from hearing centres to suit the needs of the parties or to support public access to the hearing. Concerns about privacy and issues with managing distractions from family members were also cited as reasons for joining from hearing centres. A number of respondents stated that whilst they were able to conduct telephone hearings from home,

they preferred to join video hearings from a Courts and Tribunals Hearing Centre where they had the choice to do so—the following quote exemplifies this:

“I had the choice and chose to do telephone hearings at home and CVP in the court centre. I chose to do telephone hearings at home as it meant I was safe and could look after my children; less external noise can be heard on a phone. But I preferred to do CVP in the court centre as it had more suitable blank walls and I was doing more complex work and needed the actual full file.” (Respondent 1374, Employment Tribunals, England and Wales)

- 4.9 Of the minority of respondents who stated that they had joined from locations described as “other” most were medical professionals who were joining hearings from their hospital base. One respondent stated that they had joined hearings from their car, in order to be able to access reliable network coverage:

“We are working from home. I went to Wales when we were allowed to and did not want to let the service down. I asked permission and then parked the car in the best spot for reception. It is my field.” (Respondent 273, Social Entitlement Chamber)

5 Findings: Guidance and support

A. Overview

- 5.1 The majority of respondents had both seen the guidance provided by HMCTS and Chamber Presidents and found it useful, but concerns were raised about the administrative and technical support provided to facilitate the conduct of remote hearings. Over one third of respondents reported that hearings proceeded without access to technical support to address IT issues. Where respondents *were* provided with administrative and IT support the majority stated that they were satisfied with the support they received, however experience varied considerably across chambers. Serious issues were reported with arrangements for accessing papers, which were reported as generating applications to appeal. Respondents also raised concerns about the guidance and support provided to appellants in order to prepare them to take part in remote hearings.
- 5.2 Many respondents raised concerns about reasonable expenses (such as phone bills) not being covered by HMCTS. The survey revealed the potential for disparities (or perceived disparities) in resource provisions to generate resentment between fee-paid and salaried judges. A number of respondents raised concerns about the fitness for purpose of the existing model for remunerating fee-paid judges in the context of remote hearings. Suggestions to address concerns made by respondents included that fee-paid judges be paid a writing fee to compensate for not being paid for travel costs.

B. Satisfaction with guidance

- 5.3 The majority of respondents were satisfied with the guidance that had been provided by Chamber Presidents on the conduct of remote hearings: 56% of respondents described the guidance as very useful or extremely useful ($n=1506$). Only a minority of respondents reported that they had not seen the guidance provided (3%, $n=1506$). Respondents from the Employment Tribunals (Scotland) were most satisfied with the guidance they had received: 82.4% of respondents described the guidance as very useful or extremely useful. In contrast, only 41.8% of respondents from the Social Entitlements Chamber described the guidance as useful, and 10.7% of respondents from the War Pensions and Armed Forces Compensation Chamber described the guidance as not useful.

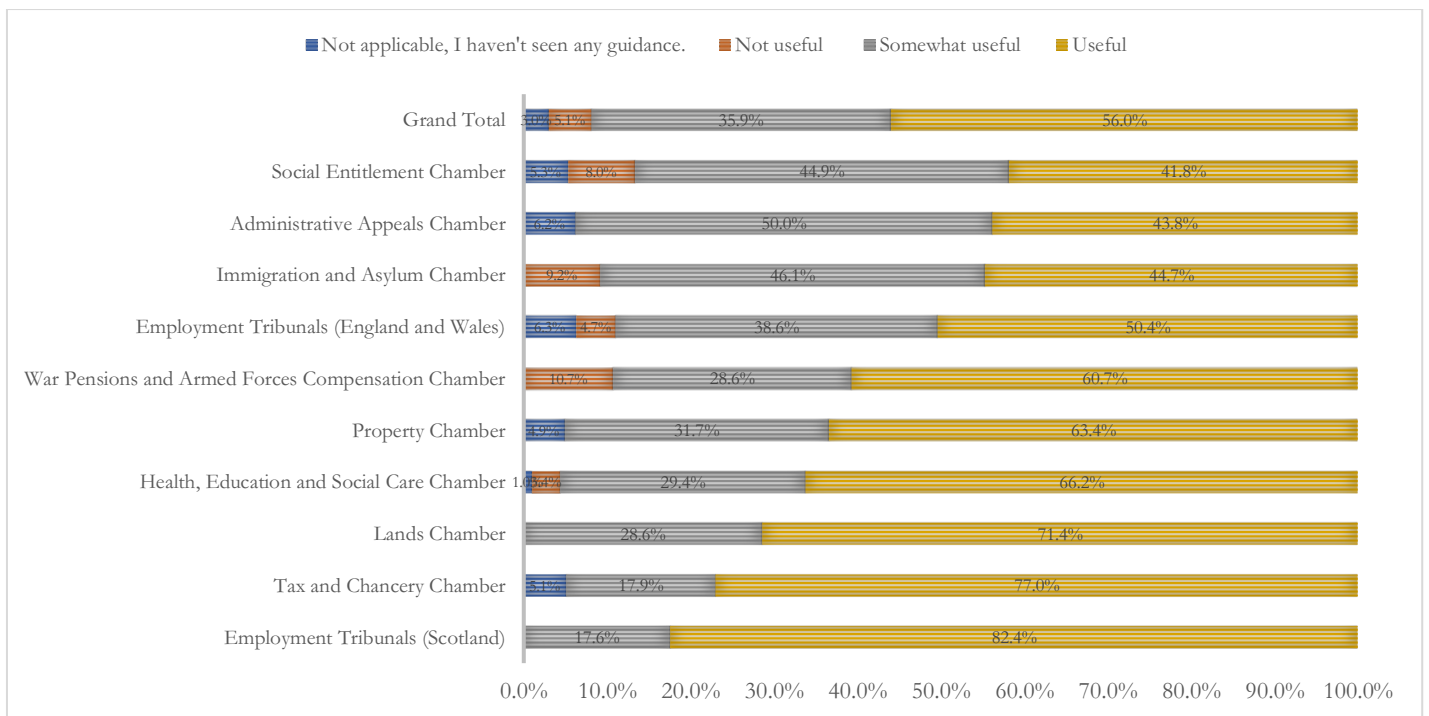


Figure 5-1: Utility of guidance provided by Chamber Presidents

- 5.4 Respondents suggested improvements that might be made to the guidance provided, these included:
- 5.4.1 Consolidating the guidance in one place and improving version control to enable judicial office holders to keep track of updates—respondents were unhappy that multiple versions of guidance had been emailed to judicial office holders as it was felt that this led to confusion.
 - 5.4.2 Including chamber-specific case studies and practical examples to illustrate good and bad practice.
 - 5.4.3 Clearly distinguishing in the guidance between instructions, guidance, and hints and tips.
 - 5.4.4 Increasing the volume of information provided about how to deal with common practical and procedural problems, for example, how to manage difficulties with interpreters, dealing with missing evidence, etc.
 - 5.4.5 Creating chamber specific precedents/scripts for conducting hearings, and more detailed guidance on hearing etiquette and how to allocate time within remote hearings.
 - 5.4.6 Improving the consistency of guidance provided across different hearing centres, and ensuring a consistent role for administrative staff e.g. specifying who will confirm case reference numbers and record start and finish times.
 - 5.4.7 Specific guidance relating to the use of interpreters, and how to manage in the absence of simultaneous interpretation.

- 5.5 A number of respondents from the Social Entitlement Chamber highlighted what they regarded as deficiencies in the support and information provided to parties to prepare them for participation in remote hearings. The failure to support parties to effectively engage e.g. through checking that they have their papers, that their equipment and connection is of a suitable standard and that they understand how to connect to hearings was felt to lead to interruptions and delays and threaten the fairness of hearings. The following quotes typify the concerns raised:

“The appellant should be asked to have their papers with them before they start the hearing. The clerks should ensure that they explain that the equipment is highly sensitive and that people should not be shouting and screaming down the phone and at other relatives. It should be ensured that the appellants’ correct phone numbers are available, that the appellants have received their papers before booking a slot, that it is explained to them that they should speak clearly into the microphone rather than having their head on a swivel and that they should not speak until whoever is speaking has finished and to not interrupt. All participants should speak at a reasonable volume and into the microphone.” (Respondent 288, Social Entitlement Chamber)

“Perhaps further advice for hearings where interpreters are involved particularly getting the appellants to respond where they do not understand how to connect in the 1st place.” (Respondent 298, Social Entitlement Chamber)

- 5.6 Respondents in the Health, Education and Social Care Chamber felt that more guidance for local authorities on how the time in remote hearings is to be used would be helpful:

“Have experienced a few Local Authorities who are treating the hearings as an opportunity for conciliation. There is not the time or space for this. Clearer guidance as to expectations of how remote hearing time is to be used needs to be issued in my opinion.” (Respondent 329, SEND Tribunal)

C. Satisfaction with administrative support

- 5.7 The majority of respondents both received administrative support (97.9%, $n=1498$) and were satisfied or very satisfied with the administrative support they had received (80.3%, $n=1467$). Whilst overall satisfaction levels were high, they varied considerably across chambers, with the War Pensions and Armed Forces Compensation Chamber, the Health, Education and Social Care Chamber and the Employment Tribunals (England and Wales) having the lowest proportion of satisfied respondents.

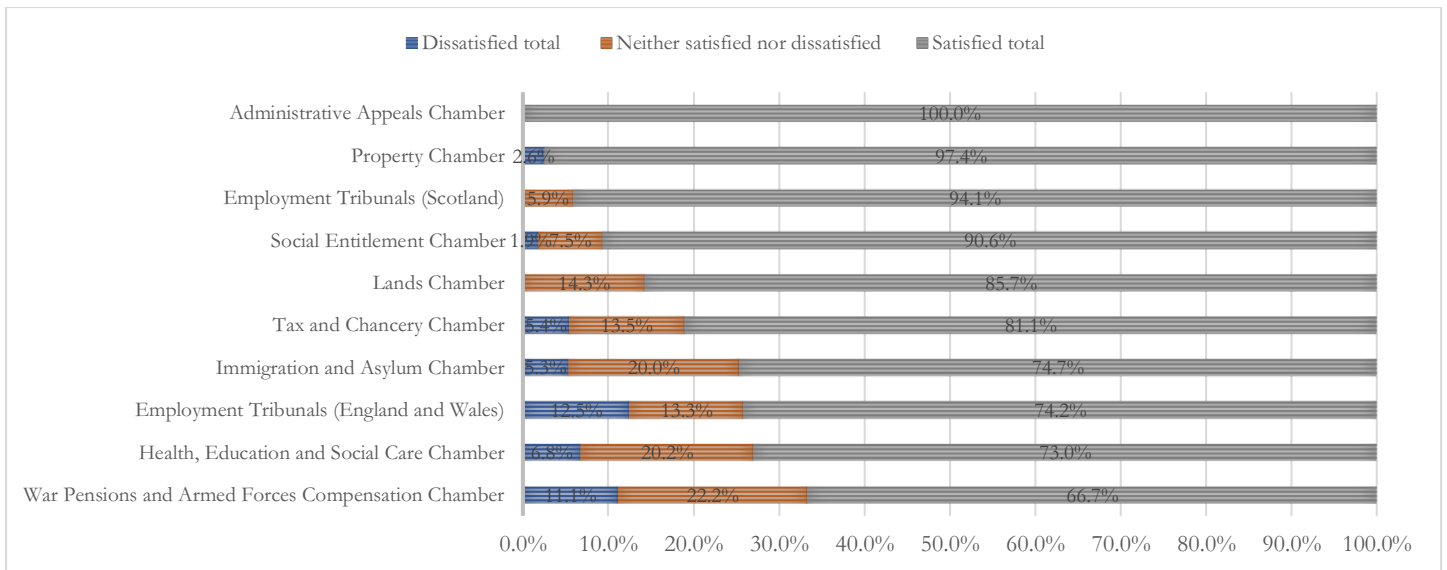


Figure 5-2: Satisfaction with administrative support (n=1467)

- 5.8 Respondents from the War Pensions and Armed Forces Compensation Chamber were concerned at the lack of administrative support available on the day of the hearing, and the burden that this placed on judges to conduct many of the procedures that would normally be carried out by clerks e.g., setting up hearings and contacting parties. There were also concerns raised about the processes for accessing and returning papers: judges reported that papers had not arrived on time, and further that the failure of couriers to collect papers had led to judges accumulating large bundles of papers at home.
- 5.9 Although the Health, Education and Social Care Chamber ranks second from lowest in terms of the proportion of respondents who were satisfied with the administrative support they had received, this figure masks the divergence in experience between respondents in the Mental Health Tribunal and those in the SEND Tribunal. 91% of respondents from the SEND Tribunal described themselves as satisfied or very satisfied with the administrative support they received, compared with 69.3% in the Mental Health Tribunal.

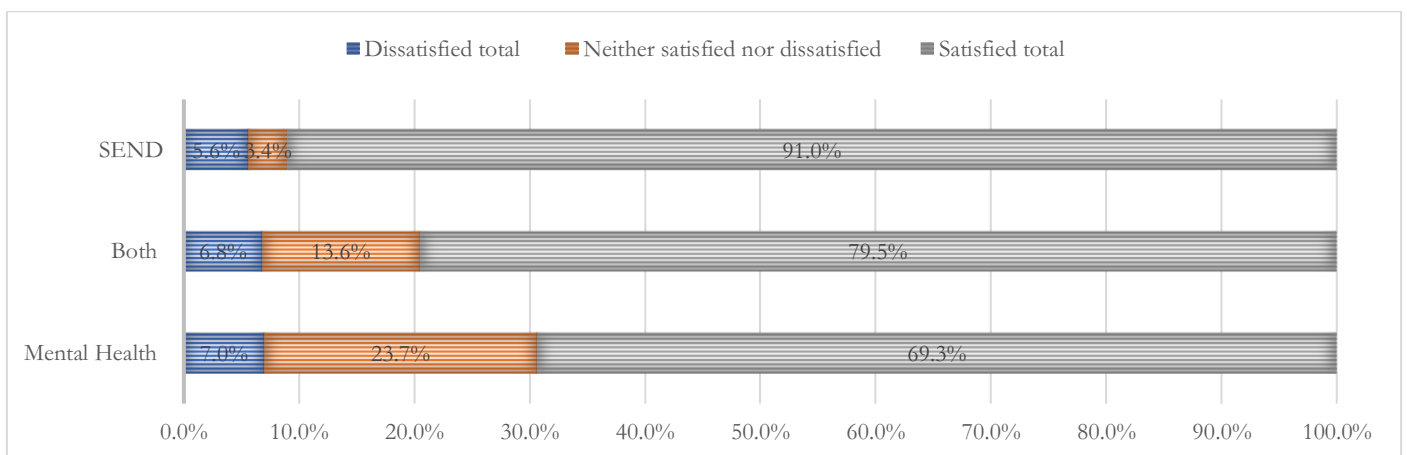


Figure 5-3: Satisfaction with administrative support in the Health, Education and Social Care Chamber (n=648)

- 5.10 In the Mental Health Tribunal, the major concerns regarding administrative support related to the late delivery of papers and reports, and the absence of support to ensure that parties were able to join their hearing:

“In the Mental Health jurisdiction, it is generally left to me, as a fee paid judge, to sort out any difficulties with people trying to enter hearings. I appreciate that the administration is short staffed and struggling to provide clerks to help with this. For a brief period only, we occasionally had clerks - this was a bit better, as I could concentrate on the issues for the hearing.” (Respondent 1186, Mental Health Tribunal)

D. Provision of IT support

- 5.11 For those respondents who were provided with technical support, the majority reported that this was provided by HMCTS (88.9%, $n=903$). Where the support was not provided by HMCTS, respondents stated that support had been provided by:

5.11.1 Colleagues and panel members;

5.11.2 Friends and family;

5.11.3 Privately-procured tech support;

5.11.4 Their alternative employer e.g. staff in NHS Trust or practice, IT support staff at chambers.

- 5.12 In the Health, Education and Social Care Chamber, respondents reported that the SEND jurisdiction had responded to the crisis by creating their own dedicated support team to assist judicial office holders and parties in joining hearings. Respondents reported that the support of this team had been invaluable in building confidence in this new approach to conducting hearings:

“Because of the urgency of the situation, the SEND jurisdiction created a support team consisting of salaried judges and admin staff to support judicial office holders and parties into hearings. This worked very well and led to the allocation of a remote Video Hearing Support team to be set up in Stoke who are now running the hearings remotely. Such support to panels and parties has been invaluable in the success of the jurisdiction’s remote hearings.” (Respondent 756, SEND Tribunal)

E. Satisfaction with IT support

- 5.13 Over one third of respondents (35.7%, $n=1494$) reported that there had been no IT support available for the hearings they had presided over. Where IT support was provided however, 40.3% of respondents described themselves as satisfied or very satisfied.

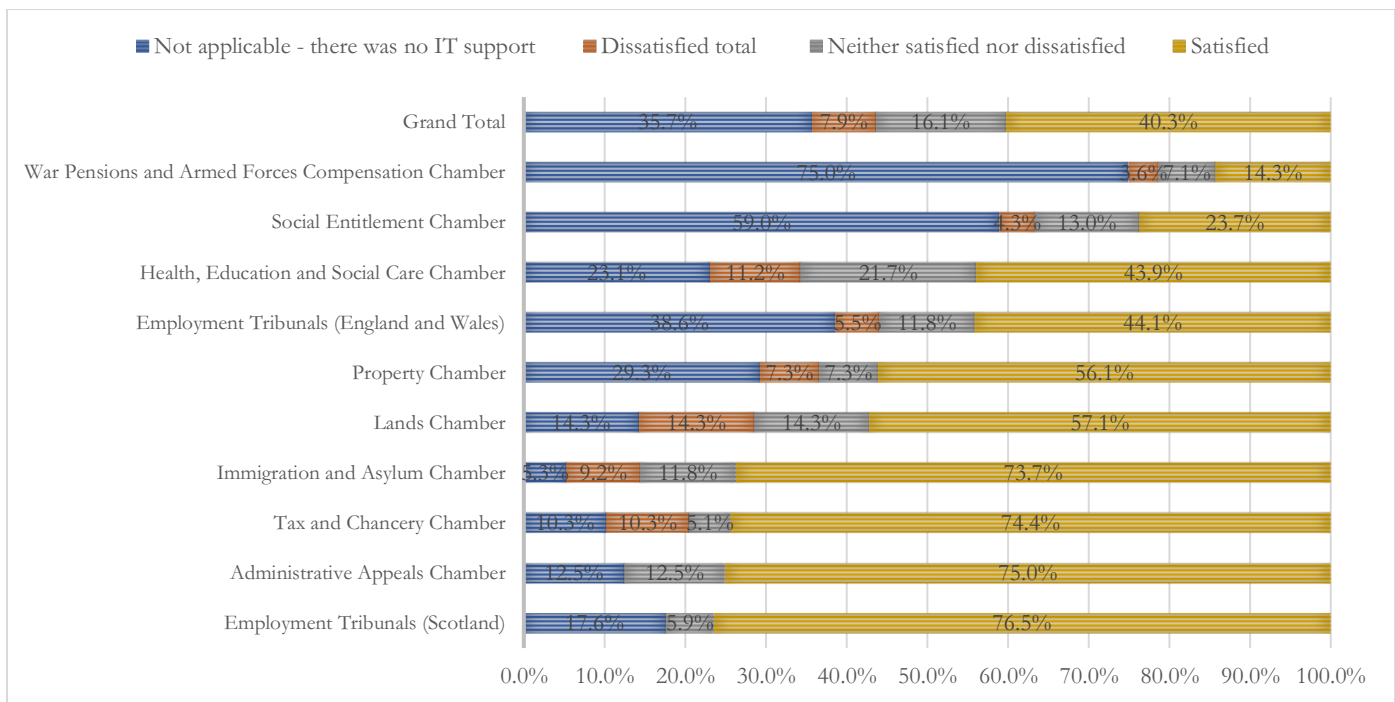


Figure 5-4: Satisfaction with IT support by chamber (n=1494)

5.14 Although the Health, Education and Social Care Chamber ranked fourth from bottom in terms of the percentage of respondents who were satisfied with the IT support they received, this figure obscures the divergence between the experience of respondents in the SEND Tribunal and those in the Mental Health Tribunal. 69.7% of respondents in the SEND Tribunal reported that they were satisfied with the IT support provided for remote hearings, compared with only 38.9% in the Mental Health Tribunal.

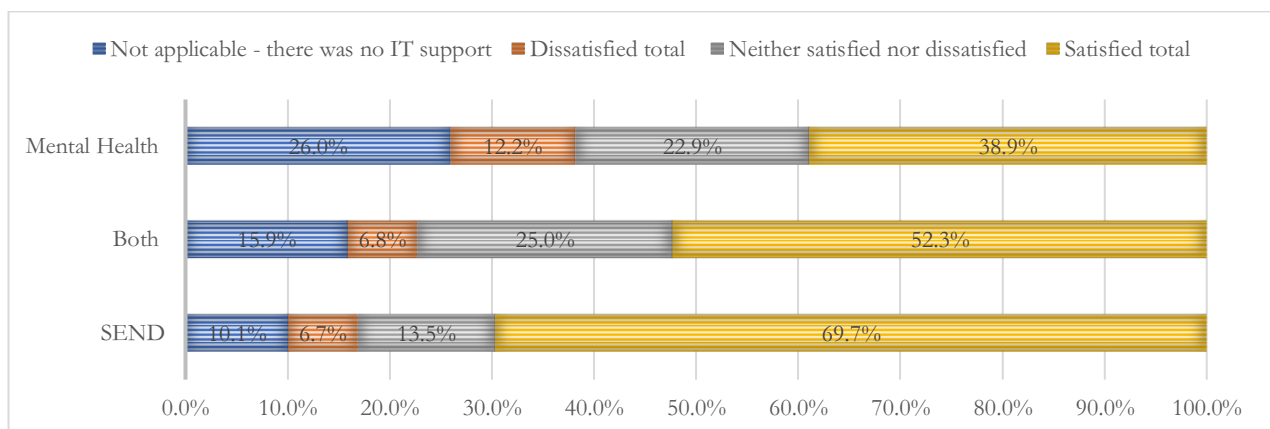


Figure 5-5: Satisfaction with IT support in the HESC Chamber

5.15 Respondents who received IT support for their hearing from “someone else” were less satisfied with the support they received. 20.8% of respondents who indicated that the support for their hearing had been provided by someone else stated that they were dissatisfied or very dissatisfied with the support they had received, compared with 7.2% of those whose support had been provided by HMCTS (n=835).

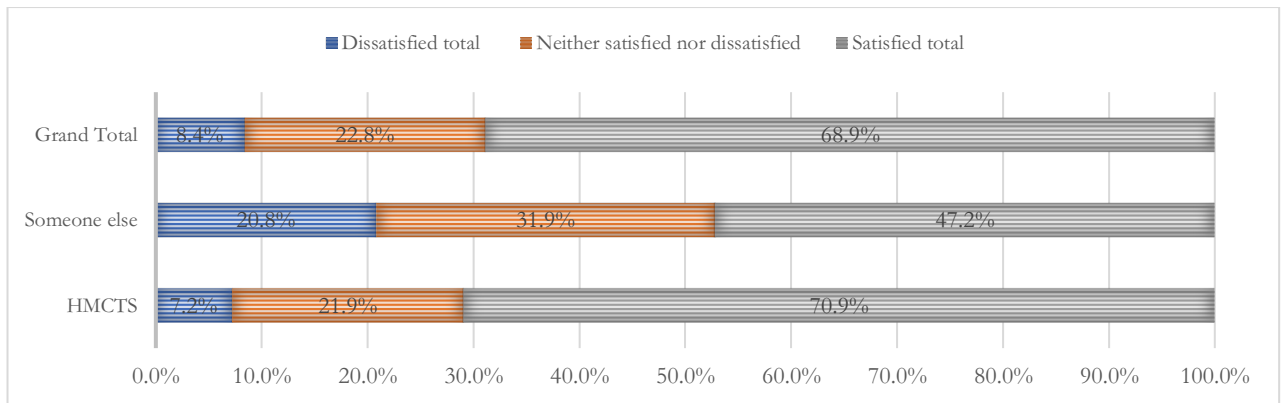


Figure 5-6: Satisfaction with IT support by provider (n=835)

F. Accessing papers

5.16 Nearly half of all respondents reported occasional or frequent difficulties in accessing the papers necessary to conduct hearings (44.1%, n=1495). Experience varied considerably between chambers, with respondents from the Employment Tribunals (both England and Wales, and Scotland) particularly badly affected.

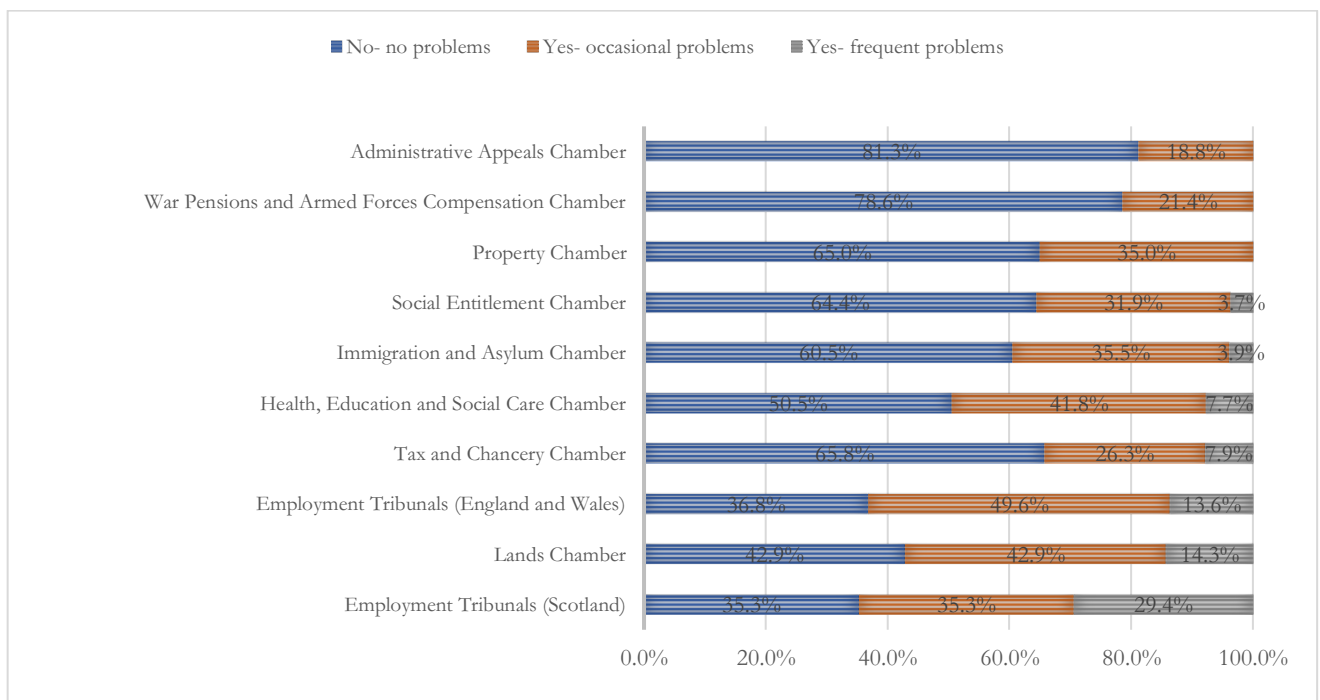


Figure 5-7: Difficulty accessing papers by chamber (n=1495)

5.17 Common difficulties reported by respondents included:

- 5.17.1 Papers being sent late, or being sent to the wrong judge;
- 5.17.2 Selective scanning meaning that key documents were not included in the file;
- 5.17.3 Failure to insert bookmarks leading to difficulties navigating large files;
- 5.17.4 Lack of provision of e-bundling software for fee-paid judges;

- 5.17.5 Issues with DOM-1 resulting in loss of remote access to online databases
- 5.17.6 Judges having to contact parties directly in order to access papers due to an absence of administrative staff;
- 5.17.7 Serious issues with scanners resulting in judges having to attend offices to access papers;
- 5.17.8 Papers being emailed as large attachments which cannot be opened, or sent as attachments to multiple emails making them difficult to find during a hearing.
- 5.18 The following quotes typify the concerns raised by respondents:

“Often not received papers that parties have sent in- parties have had to email them during the hearing. They are sent in different formats by different people and usually means jumping on one laptop screen between numerous emails from clerks and different parties and numerous attachments which are not necessarily identified in the file name. Very frustrating, confusing and time consuming.” (Respondent 1447, Employment Tribunals England and Wales)

“Errors occurred (I once had papers sent to me that related to another patient with the same surname - fortunately I looked at them soon after they arrived and informed the sender of the error and the correct papers were then sent.) Had I not looked at them when I did, the error may have had more serious consequences.” (Respondent 492, Health, Education and Social Care)

“The system in this tribunal is that papers are collated and converted to PDF if not already in that format and posted to SharePoint. At hearings there is frequently material missing as it has been sent by parties to an email box and not been added to the bundles. This delays hearings and has been the cause of applications to appeal. The tribunal needs to move to a case management system that is holistic and where submissions of documents can be made by the parties digitally to the case file.” (Respondent 824, Health, Education and Social Care)

“The digital files are an absolute mess when they arrive. They are rarely in order. Pages are the wrong way around. It is also apparent that there are sections missing from the digital files. Scanning quality is poor. Many files look like someone has just randomly thrown documents into the scanner. On occasions, zip files are completely empty. They are often provided late and problems are encountered which cannot be dealt with until shortly before the hearing. I am used to working with digital files having previously worked in the CJS. The digital files in this jurisdiction are sub-standard” (Respondent 805, Immigration and Asylum).

G. Satisfaction with resources provided

- 5.19 A number of respondents expressed dissatisfaction with the resources that had been provided to enable them to conduct remote hearings from home e.g. lack of provision of desks, appropriate chairs and, for those conducting video hearings, plain backgrounds. Respondents felt that it had been assumed that everyone had a dedicated office space in their house, when many do not.
- 5.20 Respondents expressed frustration that HMCTS had failed to cover expenses such as energy and telephone bills incurred as a consequence of conducting remote hearings. A number of respondents commented on the potential for disparities (or perceived disparities) in the hardware and software provided to fee-paid versus salaried judges to create resentment (see Chapter 8 below).

6 Findings: Satisfaction with technology

A. Overview

- 6.1 Significant amounts of equipment are needed to conduct video hearings effectively and the laptops provided as standard by HMCTS to salaried judges may require updating to improve their processing power and the quality of the inbuilt camera. Access to high-speed broadband is critical to enable hearings to take place effectively.
- 6.2 Satisfaction with the platforms used to conduct remote hearings was generally high (between 64.4% and 82.9%). Respondents were least satisfied with Skype for Business (only 64.5% of respondents who had used this platform described themselves as satisfied or very satisfied) and most satisfied with Zoom (82.9% of respondents who had used this platform described themselves as satisfied or very satisfied). Only 69.4% of respondents were satisfied with Cloud Video Platform: Cloud Video Platform had the second-highest percentage of dissatisfied users after Skype for Business. This may be considered worrying given that Cloud Video Platform has been chosen as the official platform for use across tribunals in England and Wales.

B. Equipment needed to conduct remote hearings

- 6.3 The majority of respondents reported requiring more than one device to conduct remote hearings (54.2%, $n=1501$). Respondents reported having to purchase additional equipment, including iPads, in order to access e-bundles. Multiple respondents felt that headsets were required for the effective conduct of multiple consecutive telephone hearings. A majority of respondents felt that a minimum of two screens was necessary to effectively conduct video hearings—some salaried judges were dissatisfied with delays in receiving these from HMCTS.
- 6.4 In addition to the requirement for multiple screens, respondents with experience of conducting video hearings reported the need for more powerful laptops with improved processing power, higher-quality microphones and web-cameras. The following quotes typify the responses provided:
- “I still only have a Dom1 laptop... the laptop provided is not powerful enough to be running a video hearing at the same time as me typing notes and displaying a bundle on a second screen. There are frequent freezes and slowdowns in its operation. This laptop has an 8th generation intel core i5 processor and I would have thought that future devices should have more RAM and the current 10th gen processor at core i7 level to ensure reliability. Also, a machine with a 15 inch screen (this is 13 inch) would be better suited to working in this manner.”* (Respondent 824, Health, Education and Social Care Chamber, SEND Tribunal)
- “Too small screen, sound poor, camera poor, difficult to connect to other hardware eg. ports not working properly, cheap quality, second hand.”* (Respondent 65, Immigration and Asylum Chamber)
- 6.5 Respondents also noted the requirement for high-speed broadband to effectively conduct video hearings, and further, the need for additional software to facilitate the annotation of e-bundles:

“Some of the documents are photos of documents so we cannot annotate them unless we convert them. This can only be done with the professional Adobe reader which costs £15 per month. This is standard on the laptops provided only to salaried judges and the office staff. Fee paid judges are discriminated against in this regard.” (Respondent 189, Health, Education and Social Care Chamber, SEND Tribunal)

C. Who provided the equipment for remote hearings?

- 6.6 Fee-paid judicial office holders have historically purchased their own equipment as per the terms of their employment. However, a number of fee-paid judicial office holders raised concerns about the level of cost they had been asked to bear in the context of the rapid transition to remote hearings. One respondent remarked, *“I had to buy [equipment] myself at a cost of over £1000. That is 4-5 days of sitting”* (Respondent 1056, Health, Education and Social Care Chamber, Mental Health Tribunal). Issues were particularly acute for medical members, whose NHS laptops would not enable them to download the browser needed to run Cloud Video Platform. Respondents reported having to purchase new equipment to join hearings:

“Attempting to access the video platform in the most efficient way possible. Turned out that my NHS office did not support Google Chrome, so bought a new laptop and have worked from home since the first hearing, which I had to access by telephone from my professional office.” (Respondent 1011, Health, Education and Social Care Chamber, Mental Health Tribunal)

- 6.7 Even salaried judges, whose equipment is provided by HMCTS, reported that they had needed to purchase their own equipment in order to conduct remote hearings effectively. 18.9% of all salaried judges ($n=275$) reported purchasing equipment themselves to hear cases, and 38.2% reported relying on a combination of their own equipment and equipment provided by HMCTS.

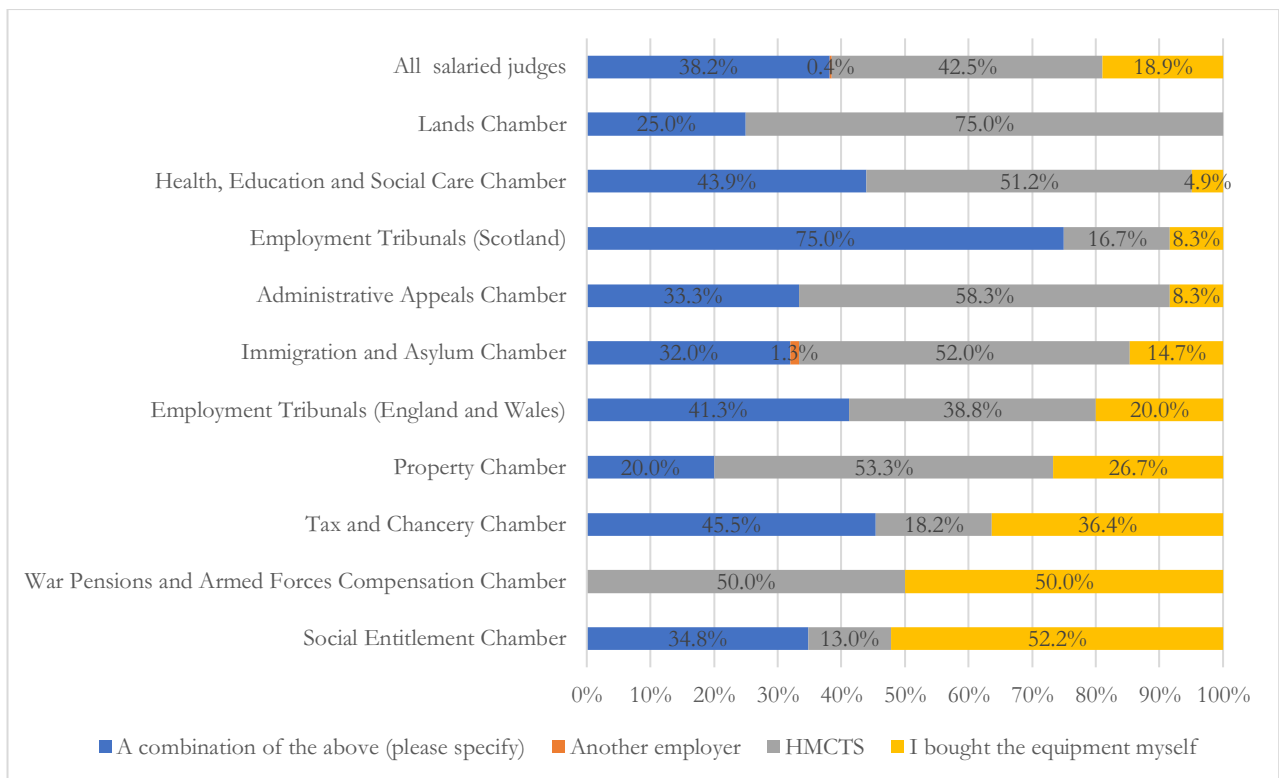


Figure 6-1: Who provided the equipment for remote hearings for salaried judges? (n=275)

D. How many platforms have respondents used to conduct remote hearings?

6.8 Respondents were asked to indicate which of the following platforms they had used to conduct hearings since March 2020: BT MeetMe, Skype for Business, Microsoft Teams, Zoom, Cloud Video Platform (Kinly) and Fully Video Hearings platform. The majority of respondents (89.7%) reported that they had used up to two different platforms to conduct remote hearings since March 2020 (n=1488).

6.9 In addition to the platforms specified in the survey, respondents indicated that they had used platforms including Loop-Up for audio hearings and Google Meet, Cisco-Webex, Amazon Chime, FaceTime, WhatsApp, Sparq and Star Leaf to support the conduct of video hearings since March. The most common reason for choosing to use Loop-Up was being directed to use this by the Tribunal. Reasons for using other video conferencing platforms included being directed to do so by the Tribunal and as a consequence of issues with Cloud Video Platform, such as being unable to connect an interpreter to proceedings. Some respondents indicated that they had used platforms such as FaceTime and WhatsApp to facilitate private deliberations between panel members.

E. Satisfaction with platforms

6.10 Satisfaction with the platforms used to conduct remote hearings was generally high (between 64.4% and 82.9%). Respondents were least satisfied with Skype for Business (only 64.5% of respondents who had used this platform described themselves as satisfied or very satisfied) and most satisfied with Zoom (82.9% of respondents who had used this platform described themselves as satisfied or

very satisfied). Only 69.4% of respondents were satisfied with Cloud Video Platform: Cloud Video Platform had the second-highest percentage of dissatisfied users after Skype for Business.

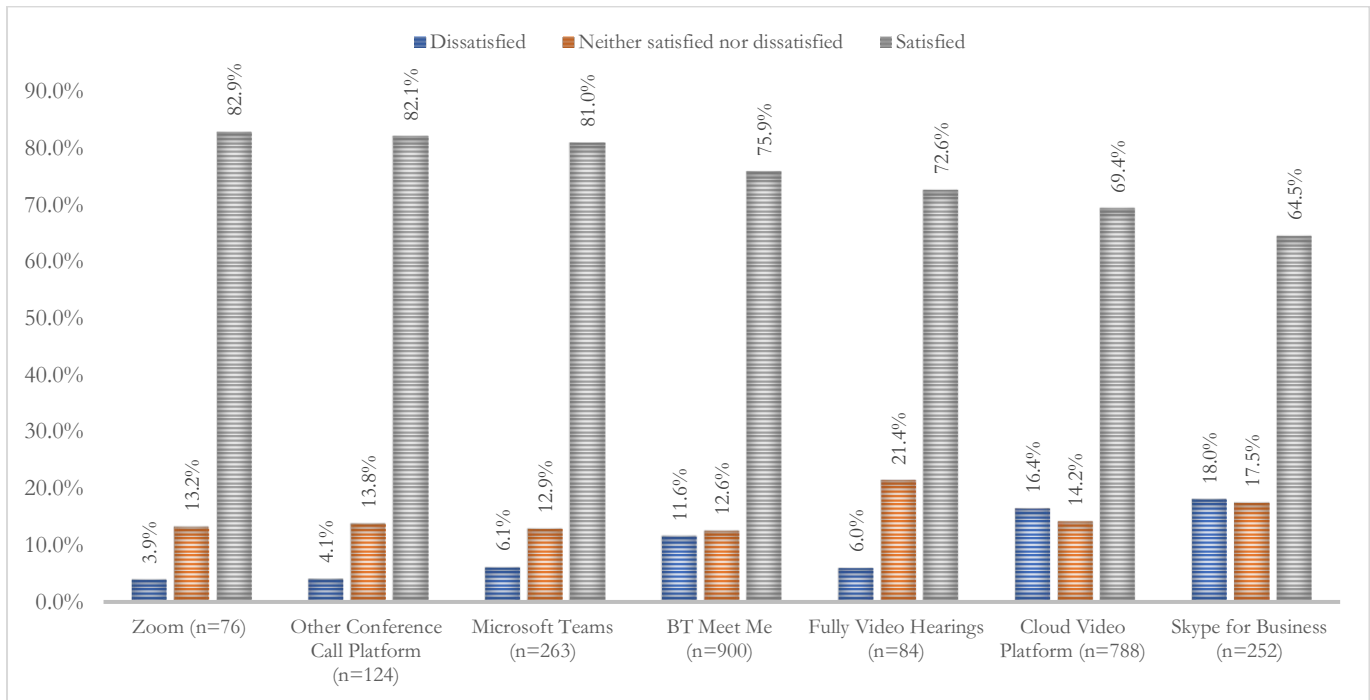


Figure 6-2: Satisfaction with platforms used to conduct hearings

F. Satisfaction with BT MeetMe

6.11 BT MeetMe is the official platform used to conduct telephone hearings—for this reason, understanding the experience of those who use this platform is particularly important. The proportion of judicial office holders who described themselves as satisfied or very satisfied with this platform varied considerably across chambers: the Tax and Chancery Chamber and the Health, Education and Social Care Chamber had the lowest proportion of satisfied respondents (50% and 72.4% respectively, $n=900$).

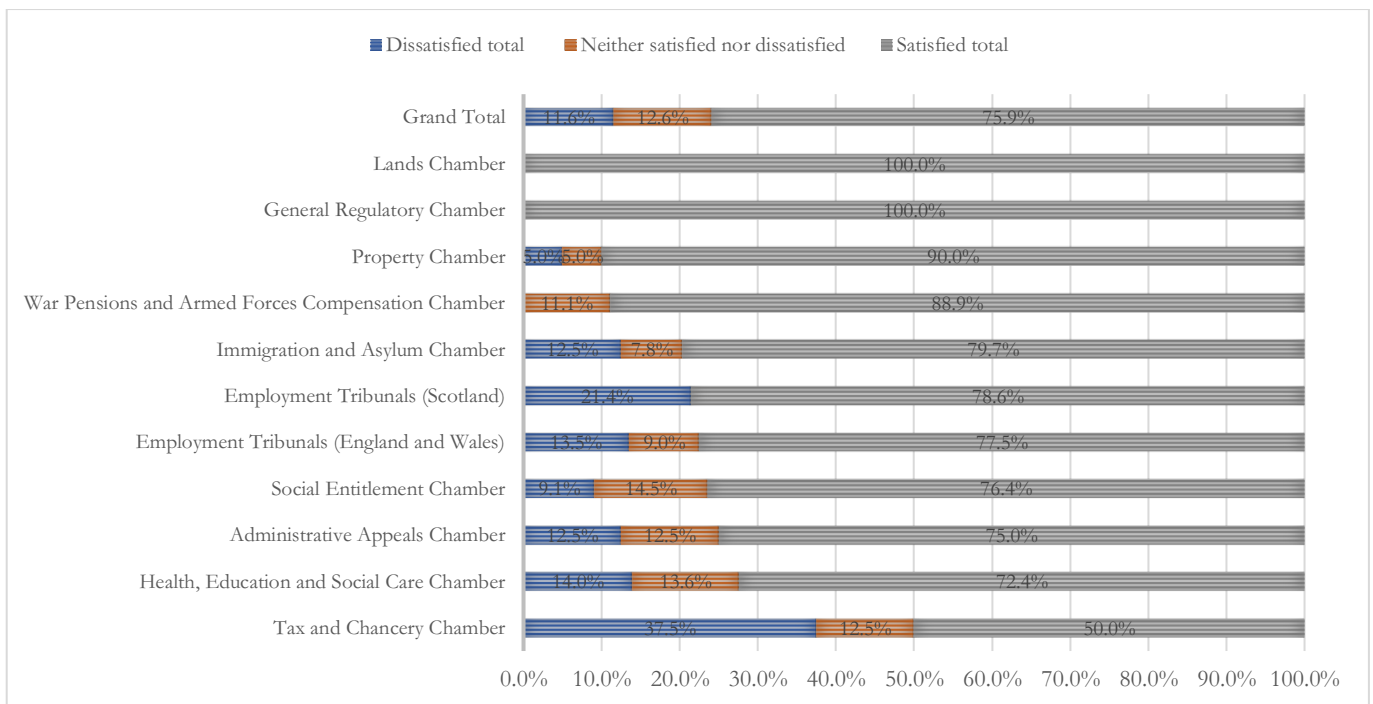


Figure 6-3: Satisfaction with BT MeetMe (n=900)

6.12 Issues with BT MeetMe reported by respondents who were dissatisfied with the platform included difficulties in “dialling-in” multiple parties without support from clerks: respondents reported that this process was cumbersome and time consuming: *“It works... BUT it is very long winded joining everyone with separate codes etc and then you have to start all over again if someone drops out”* (Respondent 57, Social Entitlement Chamber). Multiple respondents referenced experiencing poor-quality audio which was only partly corrected by using headsets. A number of respondents reported issues with the facility for recording hearings, and were concerned at the absence of a facility to notify participants when a party had “dropped off” the call unexpectedly. Respondents reported that this had led to instances where parties had disappeared from hearings and this had only been noted when judges had specifically checked to see if they were there.

6.13 Other issues raised related to the inherent suitability of telephone hearings for substantive, rather than procedural hearings, rather than to concerns about the specific platform: these are discussed in detail below at Chapter 7

G. Satisfaction with Cloud Video Platform

6.14 Cloud Video Platform is the interim video hearings platform currently being deployed across large parts of the courts and tribunals system. Cloud Video Platform will eventually be replaced by the Fully Video Hearings platform that is currently being developed and trialled by HMCTS. Understanding the reasons for the lower levels of satisfaction with Cloud Video Platform, and possible solutions to address these issues is therefore of critical importance.

6.15 Satisfaction with Cloud Video Platform varies considerably both between and within chambers. 85.2% of respondents in the SEND tribunal described themselves as “satisfied” or “very satisfied” with Cloud Video Platform, compared with 62.5% in the Social Entitlement Chamber, 64.1% in the Immigration and Asylum Chamber and 66.1% in the Mental Health Tribunal.

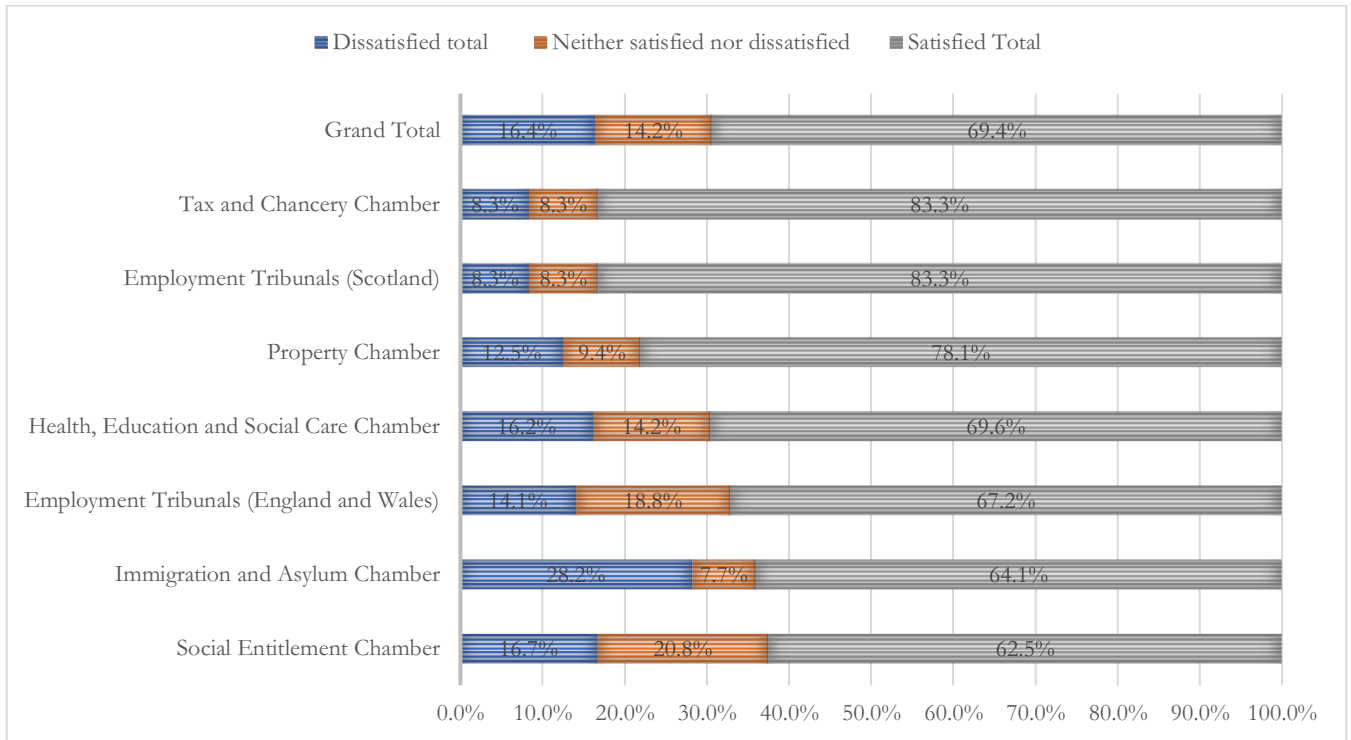


Figure 6-4: Satisfaction with Cloud Video Platform (n=782)

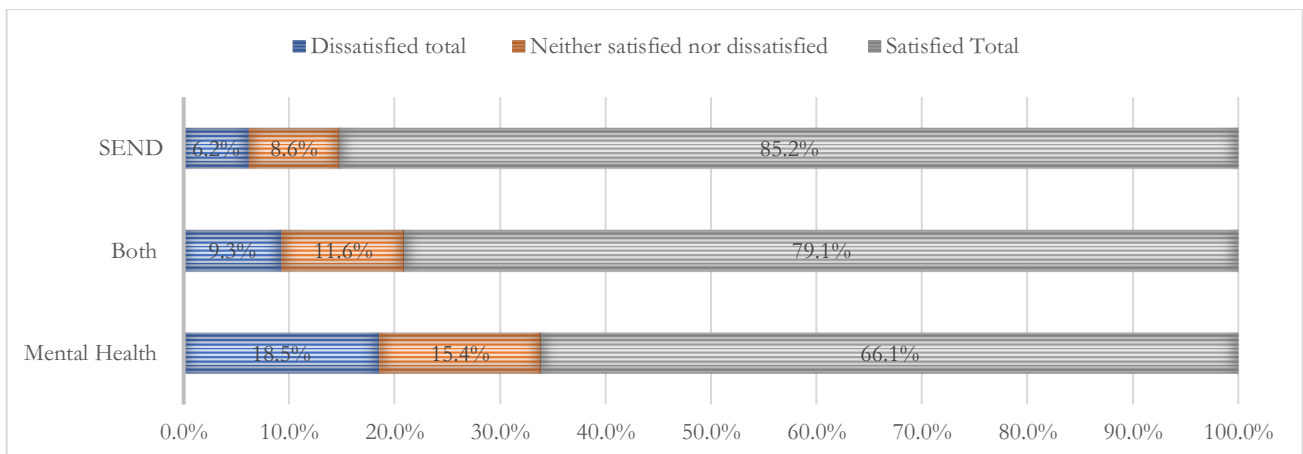


Figure 6-5: Satisfaction with Cloud Video Platform in the HESC Chamber (n=599)

6.16 Those respondents who described themselves as dissatisfied or very dissatisfied with Cloud Video Platform highlighted concerns about the stability of the platform: a number of respondents referenced issues with hearings “freezing” or parties dropping out unexpectedly:

“In every hearing at least one panel member or solicitor has frozen requiring questions to be repeated once contact is established.” (Respondent 478, Health, Education and Social Care Chamber, Mental Health Tribunal)

“Only one out of 19 hearings undertaken worked without technical issues.” (Respondent 914, Health, Education and Social Care Chamber, Mental Health Tribunal)

6.17 Other respondents indicated issues with the audio and picture quality provided by the platform: issues with feedback, distortion and time-lags were frequently referenced. The incompatibility of the platform with browsers other than Google Chrome, and the inability of the platform to cope with lower broadband speeds was also raised as a concern: *“Difficult to enter- dependent on user’s broadband”* (Respondent 1277, Immigration and Asylum Chamber). Issues with connectivity were cited by multiple respondents as significantly extending the duration of hearings: *“Connectivity always problematic. Often cannot have a reliable video connection. Adds about 30-60 mins to each bearing.”* (Respondent 226, Health, Education and Social Care Chamber, Mental Health Tribunal).

6.18 Some respondents expressed frustration at the perceived unwillingness of the providers of Kinly software to act on concerns that the platform was failing to perform effectively:

“I have found the attitude of those who have 'created' or 'own' Kinly to be most unhelpful. They appear to have been...in denial for a long time that there was anything wrong with the system. This has wasted valuable time trying to get something better. It feels like a 'world beating' in house cheap effort that has gone the way of track and trace. It is not fit for purpose and does not allow what is needed such as easy file share etc. It has felt as if it has been forced on us when there are much better systems out there. The courts have been neglected for years in this and other departments and that became apparent when tech was needed.” (Respondent 65, Immigration and Asylum Chamber)

6.19 A number of respondents raised concerns about the security of the platform and provided examples of occasions where witnesses had joined the wrong hearing, despite being given the correct joining details:

“There have been occasions when witnesses for other hearings have joined despite having the correct log in details.” (Respondent 841, Health, Education and Social Care)

6.20 Respondents also highlighted the inadequacy of the platform for recording hearings and the absence of a proper mechanism to facilitate document sharing as a key issue. A number of respondents felt that having the ability to present a neutral background (as is offered by Microsoft Teams and Zoom) would provide useful additional functionality.

6.21 Respondents’ additional suggestions for improvements to Cloud Video Platform included:

6.21.1 Larger pictures of attendees, and the ability to view all participants on the screen at once;

6.21.2 The addition of a virtual waiting room to facilitate pre-hearing discussions between parties;

6.21.3 A mechanism to enable panel members to speak to each other confidentially;

- 6.21.4 Subtitles/real time speech to text facility to enable speakers to be understood and support those with hearing difficulties to participate in hearings;
- 6.21.5 Improved ability to reliably join interpreters and a “pinning” function to enable them to be seen by the panel.

7 Remote hearings and access to justice

A. Overview

- 7.1 The impact of remote hearings on access to justice varies between and within chambers. Respondents indicated that proceeding with hearings remotely has created new practical and attitudinal barriers to accessing the justice system for some parties, whilst reducing them for others. Respondents reported that patients in detained settings appearing before the Mental Health Tribunal have been particularly adversely affected by a lack of access to adequate equipment and broadband.
- 7.2 Whilst respondents considered that remote hearings had reduced psychological barriers to attending hearings for some, these had been amplified for others: particularly those with low levels of digital literacy and confidence; English as an additional language; those on low incomes; parties experiencing mental health problems; and parties with hearing and learning difficulties.

B. Defining access to justice

- 7.3 The common law in England and Wales establishes a definition of access to justice²⁰ that can be summarised as consisting of four parts: access to the formal legal system; access to a fair and effective hearing; access to a decision in accordance with law; and access to an outcome or remedy.²¹ The first three elements of this definition serve as a helpful framework for evaluating the impact of the introduction of remote hearings under COVID-19 on access to justice in the tribunals. The following chapter uses this framework to structure the findings from the survey.

C. Remote hearings and access to tribunals under COVID-19

- 7.4 Access to the formal legal process for the determination of disputes and vindication of rights has long been held to be a critical component of the common law definition of access to justice.²² Mechanisms put in place to provide access to the courts and tribunals must be “practical and effective” and not “theoretical or illusory”.²³ It has been established in case law that, when assessing whether or not a given system poses an inherent risk to access to justice, the test must consider the “full run of cases”.²⁴ Further to this, case law (*R(Unison) v Lord Chancellor* [2017] UKSC 51 [96]) has

²⁰ For a summary of the legal basis of this definition see: N. Byrom (2019a) “Developing the Detail: Evaluating the Impact of Court Reform in England and Wales” and N. Byrom (2019b) “Digital Justice: HMCTS Data Strategy and Delivering Access to Justice: Report and Recommendations”.

²¹ As tribunals do not have enforcement powers of their own, the latter component is not relevant here, see: Tribunals Courts and Enforcement Act 2007 c15.

²² Per Lord Diplock, *Bremer v South India Shipping Corporation Ltd* (1981) AC 909, 917.

²³ See: *R (Gudanaviciene & Ors) v Director of Legal Aid Casework & Lord Chancellor* [2014] EWCA Civ 1622; [2015] 1 W.L.R. 2247 [46].

²⁴ In determining whether a system poses an inherent risk to access to justice, the case law establishes that the test to be applied is whether: “looking at the full run of cases...that go through the system, the other forms of assistance relied on by the Lord Chancellor are adequate and available” to ensure effective participation (*R (Howard League for Penal Reform and The Prisoner’s Advice Service) v Lord Chancellor* [2017] EWCA Civ 244 [51]) and “whether the safeguards relied on are sufficient to render the system fair and just” (*R (Detention Action) v First Tier Tribunal (Immigration and Asylum Chamber)* [27]). Answering this question requires: “a

held that changes to the justice system that may impact on access to justice should be assessed according to their likely impact on behaviour in the real world.²⁵ As such, assessing the impact of the expansion of remote hearings on access to tribunals under COVID-19 requires us to examine the practical and behavioural impact of shifting to this method of determining cases.

C.1. Remote hearings and practical access to tribunals under COVID-19

7.5 In the early days of the pandemic, the introduction of a national lockdown meant that proceeding with cases remotely was the only way in which access to the tribunals could be maintained. Many respondents praised the speed with which procedures to facilitate the expansion of remote hearings had been put in place across the tribunals system, emphasising that the absence of these measures would have resulted in complete denial of access for many for the duration of the pandemic:

“They have been set up quickly and well. If they had not been set up then vulnerable appellants would not have had any of their cases heard.” (Respondent 1419, War Pensions and Armed Forces Compensation Chamber)

“Remote hearings have been a necessary evil in ensuring that the continued detention of mental health patients could continue to be reviewed in accordance with their rights.” (Respondent 729, Mental Health Tribunal)

“They have enabled the Tribunal to continue to deliver justice during a difficult time for all.” (Respondent 1352, Immigration and Asylum Chamber)

7.6 In addition to tackling the immediate practical barriers to access created by COVID-19 measures, some respondents emphasised the potential role for remote hearings to improve efficiency and address historic backlogs which in themselves constitute a practical barrier to accessing justice (although this varied across chambers). For example, respondents from the Special Educational Needs and Disability Tribunal reported that remote hearings had dramatically increased their capacity to hear and decide cases, as the following quote demonstrates:

“We have completed over 1000 video hearings in SEND since lockdown. It has been a very positive experience. Parties have given great feedback. We have not had to postpone a case since lockdown when we were previously postponing 80 plus cases per week. We have caught up on our backlog.” (Respondent 587, Special Educational Needs and Disability Tribunal)

7.7 Conversely respondents from the Immigration and Asylum Chamber reported that hearings were taking longer to conduct, and that this was contributing to the development of backlogs in this jurisdiction:

detailed examination of the support that is available in in practice” (R (*Howard League for Penal Reform and The Prisoner’s Advice Service*) v Lord Chancellor [2017] EWCA Civ 244 [52]).

²⁵ A. Bogg (2018) “The Common Law Constitution at Work: R (*on the application of UNISON*) v Lord Chancellor” *Modern Law Review* 81 (3) MLR 509-538.

“I am concerned that a large backlog of cases will build up because we are not able to bear as many substantive cases remotely in a day as we were before lockdown. Also because we are now dealing with a far far greater number of case management hearings and also dealing with more technical administrative things, we have much less time available to bear substantive appeals and write them up. It is simply not sustainable in the long term, I believe.” (Respondent 802, Immigration and Asylum Chamber)

- 7.8 Respondents emphasised that proceeding with hearings remotely had the potential to reduce practical barriers to accessing tribunals for some parties; for example, it was felt that those with caring responsibilities, individuals with mobility issues and parties lacking adequate access to transport had benefitted practically from the expansion of remote hearings.
- 7.9 In contrast, respondents from the Mental Health Tribunal, Social Entitlement Chamber and Immigration and Asylum Chamber reported that remote hearings had exacerbated practical barriers to accessing tribunals for the following groups:
- 7.9.1 Parties on low incomes without access to equipment, phone credit or broadband;
- 7.9.2 Parties with mental health or learning difficulties;
- 7.9.3 Parties with English as a foreign language;
- 7.9.4 Parties who are deaf or hard of hearing, those with impaired sight or speech and language difficulties;
- 7.9.5 Parties in detained settings, such as mental health hospitals, immigration detention centres or prisons.
- 7.10 Multiple respondents from the Social Entitlement Chamber reported difficulties in contacting parties on the day of their hearing. Respondents were unclear as to whether this was due to issues with administrative support, e.g. failure to check and supply the correct telephone numbers for parties, or unwillingness to participate on the part of appellants: *“Unable to contact appellant in about one in four cases. Line goes dead when judge rings number and doesn't know if no reply doesn't if connected or the person isn't picking up the phone.”* (Respondent 249, Social Entitlement Chamber). A number of respondents raised concerns that appellants were not receiving adequate notice of their hearings or access to relevant papers: *“Many appellants appear to be unaware of the hearing, some haven't received papers”* (Respondent 304, Social Entitlement Chamber).
- 7.11 Similarly, respondents from the Mental Health Tribunal dealing with appeals involving patients in community settings described persistent issues contacting patients. Remote hearings were felt to be particularly problematic for those on low incomes. Many respondents reported that those on low incomes simply do not have access to the equipment and broadband to enable them to join remote hearings:

“Patients subject to community orders do not always have equipment that allows them to use CVP. On one occasion a vulnerable 19-year-old was only able to take part because his support worker was willing to log in on his iPhone. Another woman, living alone with limited experience in using technology, was simply unable to connect despite having tried for 30 minutes on two occasions.” (Respondent 192, Mental Health Tribunal)

“It was concerning to have a patient who was not able to continue attendance via phone as they ran out of credit on their mobile and their benefits had not been sorted. At least in physical hearings patients are likely to be able to attend (especially for Community Treatment Order cases as they may well get a lift from the care coordinator if no other means- however regarding remote hearings really vulnerable patients are at the mercy of digital poverty issues- and hence the hearing can be inequitable. In the case described above, the judge called the patient (anonymising their number) which was the only way the patient could continue participating in their hearing- this needs to be addressed.” (Respondent 120, Mental Health Tribunal)

- 7.12 Respondents reported that lack of access to appropriate technology can also pose a major barrier to accessing hearings for parties in detained settings. A majority of respondents from the Mental Health Tribunal reported serious issues with the technology available to patients in hospital. Respondents reported that a combination of security settings on NHS computers, and the inability of clinicians to download Google Chrome had prevented many patients from joining video hearings altogether, or forced them to attempt to participate from shared equipment. Multiple respondents referenced occasions where patients had joined hearings from one screen alongside clinicians who were giving evidence in their case, or from borrowed iPhones:

“Access to appropriate technology and facilities in hospitals often a problem (e.g. Consultant, nurse and patient on one iPhone). Interference is common and unpredictable as are signal failures leading to loss of panel members.” (Respondent 1022, Mental Health Tribunal)

“I think it’s appalling that many hospitals are only providing phones for patients to join tribunals and not laptops.” (Respondent 485, Mental Health Tribunal)

C.2. Remote hearings and attitudes to accessing tribunals under COVID-19

- 7.13 Respondents reported that expanding the use of remote hearings had reduced psychological barriers to attending tribunals for individuals who might be anxious or intimidated by the prospect of attending hearing centres. Respondents from the Administrative Appeals Chamber, and the Special Educational Needs and Disability Tribunal reported that remote hearings made attending hearings a less intimidating prospect, as parties were able to join from the relative comfort of their own homes. Respondents from the Special Educational Needs and Disability Tribunal reported that parents in particular found remote hearings to reduce attitudinal barriers to attendance:

“In the SEND tribunal parents have liked the remote hearings as it has made attending easier for them and less stressful. One parent who had experienced a physical hearing for another child stated she preferred the remote hearing.” (Respondent 140, Special Educational Needs and Disability Tribunal)

- 7.14 Respondents from the Mental Health Tribunal however reported that many patients who were already vulnerable found the experience of joining remote hearings more daunting, and that this had impacted on attendance at hearings:

“More patients choose not to attend.” (Respondent 1248, Mental Health Tribunal)

“Two of the patients opted out. Perhaps some reassurances from the panel might have helped them in deciding.” (Respondent 807, Mental Health Tribunal)

“I feel the remote experience, is probably daunting and off putting for the patients who are appealing their Detention especially those who are less articulate or whose first language is not English.” (Respondent 462, Mental Health Tribunal)

- 7.15 The relatively novel nature of the use of video and audio technology for substantive, as opposed to case management hearings, and the absence of good evidence to demonstrate that these hearings result in parity of experience and outcome for parties may deter individuals from accessing tribunals. Respondents from the Social Entitlement Chamber reported that where parties were able to access legal advice, advisors were recommending that parties should not take part in remote hearings. Further to this, respondents from the Employment Tribunals (Scotland) and Employment Tribunals (England and Wales) reported that parties and their representatives were using concerns about the remote process as an excuse to delay their cases:

“Parties are mostly keen to cooperate to make remote hearings work. Some parties have tried to use the absence of in person hearings as a reason to put off hearings, in circumstances where I have felt they were just trying to avoid a hearing, rather than because they had real concerns about remote hearing.” (Respondent 1225, Employment Tribunals England and Wales)

D. Access to a fair and effective hearing

- 7.16 Access to a fair and effective hearing is enshrined as a key component of access to justice across all legal jurisdictions. Within the specific context of both First-Tier and Upper Tribunals, procedural rules emphasise the importance of parties being able to “participate fully in proceedings so far as is practicable”.²⁶ Participation is presented as critical to ensuring that the overriding objective of dealing with cases “fairly and justly” is met. As such, in the context of tribunals in particular,

²⁶ See for example: The Tribunal Procedure (Upper Tribunal) Rules 2008 UKSI 2008 No.2698 (L.15). <https://www.legislation.gov.uk/ukSI/2008/2698/contents>.

facilitating effective participation may be considered key to ensuring that hearings are fair and effective.

- 7.17 In spite of the primacy given to the importance of “participation” in tribunal procedure rules, the concept is under-explored and poorly defined. Two empirical studies²⁷ have attempted to identify the core components of full participation, and the features of legal proceedings that can act as barriers to participation. Professor McKeever, reporting on her empirical research with both represented and unrepresented litigants in tribunals, argues that participative experiences are those where parties experience engagement, collaboration, and a sense of being enabled. McKeever argues that barriers to engagement can be divided into four categories: intellectual barriers, which prevent parties from understanding the legal process; practical barriers, which relate to not knowing how to get help with the legal process; emotional barriers, which arise from negative feelings associated with both the legal process and the issue being litigated; and attitudinal barriers, such as the perception that court actors view them in a negative light.²⁸
- 7.18 The Equal Treatment Bench Book published by the Judicial College emphasises that it is for judges to ensure that all parties, particularly those who may be considered disadvantaged, can participate fully in proceedings.²⁹ The guidance provided in the Equal Treatment Bench Book suggests that securing full participation involves ensuring:
- 7.18.1 That adjustments are made for disability and disadvantage, and to mitigate distress;
 - 7.18.2 That parties understand both the process and the outcome of the process;
 - 7.18.3 That parties are able to prepare and present their case effectively, either in person or through their legal representative with who they can freely communicate;
 - 7.18.4 That parties are given the opportunity to present the information necessary to enable the judge to make a determination solely on the legal and factual merits of the case.
- 7.19 Judicial College guidance further emphasises the importance of ensuring that processes are both fair and feel fair to the parties, in order to maintain trust in the justice system. Guidance produced for the judiciary on the conduct of remote hearings states the importance of ensuring procedural justice in the following terms:

²⁷ G. McKeever (2013) “A Ladder of Legal Participation for Tribunal Users”, *Public Law*, July 2013. Available at: <http://dx.doi.org/10.2139/ssrn.3523954> and P. Cooper and J. Jacobson (2020) *Participation in Courts and Tribunals: Concepts, Realities and Aspirations* 30 September 2020, Bristol University Press: ISBN 978-1529211290.

²⁸ G. McKeever (2020) “Remote Justice? Litigants in Person and Participation in Court Processes During COVID-19” MLRForum 005. Available at: <http://www.modernlawreview.co.uk/mckeever-remote-justice>.

²⁹ See Judicial College (2018) “Equal Treatment Bench Book” (March 2020 Revision) London p. 6. Available at: <https://www.judiciary.uk/wp-content/uploads/2020/05/ETBB-February-2018-amended-March-2020-17.09.20-1.pdf>.

“The process, rather than merely the result, is a significant consideration in terms of the delivery of real justice. An individual is more likely to accept an adverse conclusion where it has been arrived at after a process which has been transparently just, where the needs of all have been considered, and where they have felt engaged in the process and the outcome is explained. Such acceptance both avoids further appeals and contributes to public confidence in the judicial system. Conversely, a hearing that is perceived as unfair can fuel mistrust and legal argument for years to come.”³⁰

7.20 The following section presents the views of respondents regarding the impact of the rapid expansion of remote hearings on fairness and participation.

D.1. Which hearings are well suited to being conducted remotely?

7.21 The majority of respondents felt that telephone hearings were effective for routine procedural and case management matters, noting that tribunals were experienced in deploying telephone hearings for this purpose prior to the pandemic. In addition, telephone hearings were felt to be appropriate for dealing with short simple matters, where parties were represented. Some respondents commented that the nature of telephone hearings encouraged parties and representatives to focus on the key issues, reducing the duration of the hearing:

“For simple hearings the flexibility that it provides is a good thing - it saves travel time and is normally fit for purpose.” (Respondent 30, Health, Education and Social Care Chamber, SEND Tribunal)

“Audio hearings are very focussed and I have found them to be [a] good experience for that reason.” (Respondent 90, Lands Chamber)

7.22 In the case of video hearings, respondents felt that these worked best for short, straightforward hearings which concerned points of law, rather than live evidence. Some respondents from the Employment Tribunals (England and Wales) felt that video hearings worked well for judicial mediations. Hearings involving represented parties and professionals were felt to be most suited to video hearings, although respondents observed that much depended on the quality of broadband and technology available to parties. Even hearings where parties were represented could prove problematic if they were not joining from the same location and parties did not have good access to broadband.

“They probably work better when the facts are agreed and the appeal turns [on] points of law only” (Respondent 158, Tax and Chancery Chamber)

³⁰ Judicial College (2020) “Good Practice for Remote Hearings” Available at: <https://www.judiciary.uk/wp-content/uploads/2020/03/Good-Practice-for-Remote-Hearings-May-2020-1.pdf>

“The separation of appellant and representatives [is] a major issue, increase in limited instruction, and harder for appellant to amend instruction and get support from rep as hearing goes on. Feel significant issue at times and gets in way of justice.” (Respondent 63, Mental Health Tribunal, Health, Education and Social Care)

7.23 Remote hearings, both telephone and video, were felt to be less suitable for final hearings. Respondents stated that remote hearings tended to be problematic where:

7.23.1 The hearing is longer;

7.23.2 Factual matters are in dispute;

7.23.3 Issues of credibility are engaged;

7.23.4 There are multiple participants and witnesses;

7.23.5 Parties are unrepresented;

7.23.6 Parties require the assistance of an interpreter;

7.23.7 Parties experience physical or mental health difficulties, including hearing loss;

7.23.8 Issues are highly contested.

D.2. The impact of remote hearings on the ability to identify and address vulnerability

7.24 The Equal Treatment Bench Book affirms that identifying and making adjustments for disabilities or other disadvantage is critical to facilitating full and effective participation.³¹ As such, understanding the impact of the transition to remote hearings on the ability of judicial office holders to identify when parties may be disadvantaged and to take steps to mitigate this is critical to understanding the impact of remote hearings on participation.

7.25 Nearly half of respondents (44.9%) who had conducted audio (telephone) hearings felt that it was difficult to identify when parties were vulnerable and may require reasonable adjustments. This figure dropped in the context of video hearings, where just over one third of respondents (34.5%) who had conducted video hearings stated that they found it difficult to identify when parties were vulnerable and required adjustments (see Figures 7.1 and 7.2 below).

³¹ See Judicial College (2018) “Equal Treatment Bench Book” (March 2020 Revision) London p. 4. Available at: <https://www.judiciary.uk/wp-content/uploads/2020/05/ETBB-February-2018-amended-March-2020-17.09.20-1.pdf>.

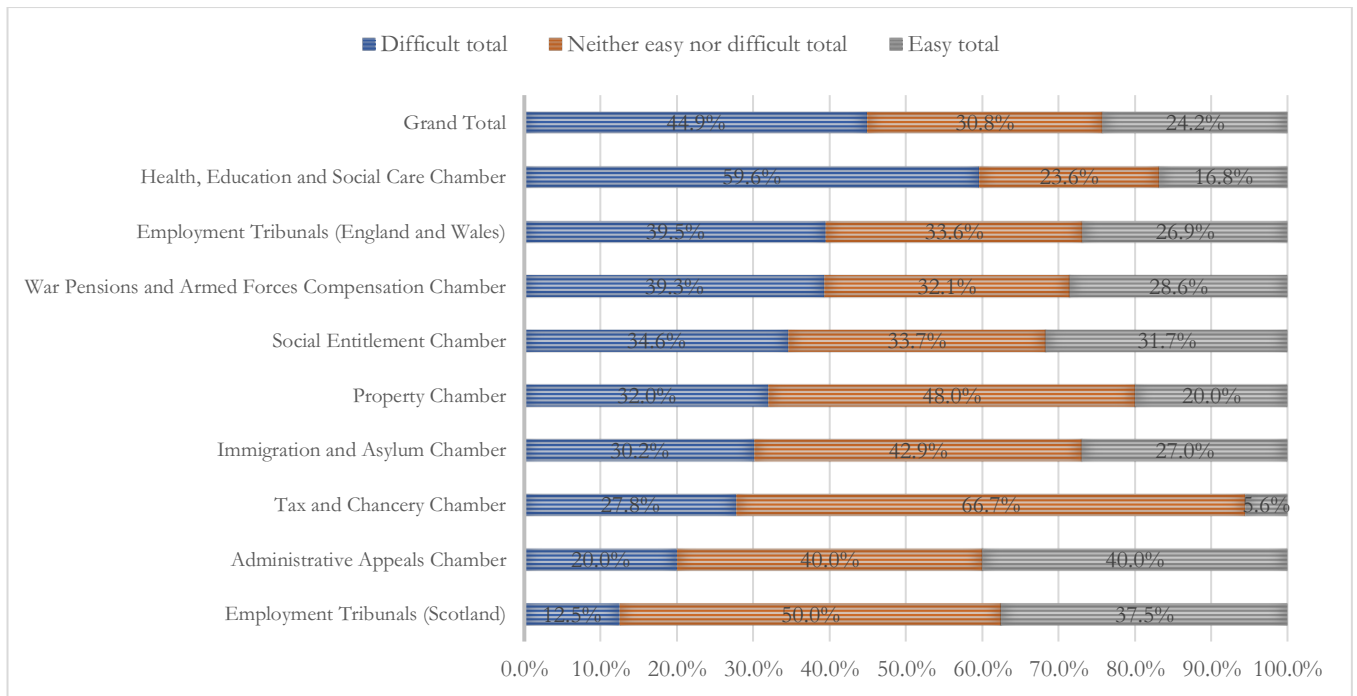


Figure 7-1: How easy is it to identify when parties are vulnerable and may require reasonable adjustments to participate during audio (telephone) hearings? (n=1324)

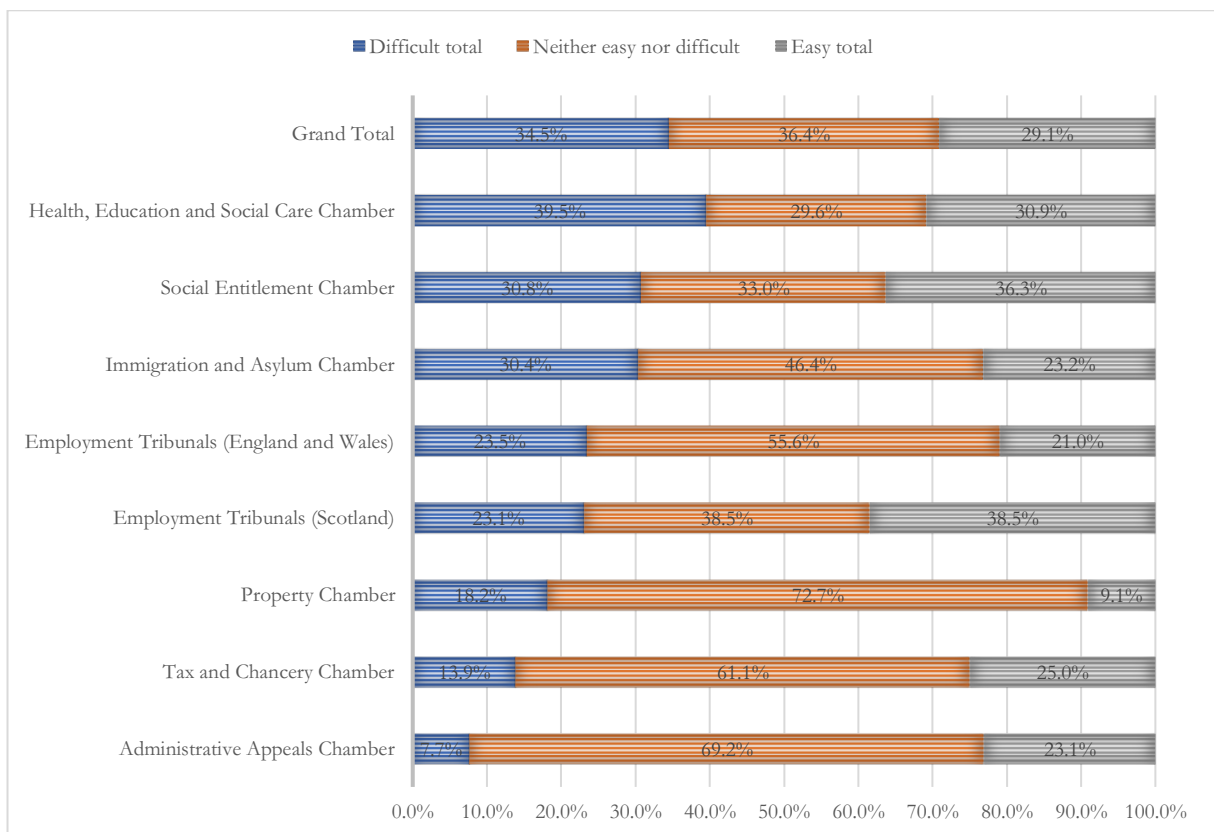


Figure 7-2: How easy is it to identify when parties are vulnerable and may require reasonable adjustments to participate during video hearings? (n=968)

7.26 Perceptions of the ease with which it was possible to identify vulnerability during audio (telephone) hearings varied considerably between chambers (see Figure 7.1 above). Respondents from the

Administrative Appeals Chamber and Tax and Chancery Chamber reported high levels of expert legal representation at the telephone hearings they had conducted, eliminating issues regarding the identification of vulnerability. Respondents from Employment Tribunals (Scotland) cited the role of clerks and information contained within the case file in helping to identify where parties were vulnerable.

- 7.27 A majority of respondents reported that proceeding with hearings remotely had forced judges to rely to a greater extent on the information contained within papers, or provided by legal representatives. Where this information was not supplied, or the party was unrepresented, respondents reported that it was very difficult to identify when a party was at a disadvantage. Unsurprisingly, respondents tended to report that audio hearings were more problematic in terms of identifying vulnerability not indicated by representatives or in papers, due to the absence of visual clues which might ordinarily enable them to identify previously undisclosed issues:

“When the paperwork has indicated a mental health problem the panel has been alert to difficulties that the Appellant may experience but without that indication, it is difficult to identify whether someone is vulnerable and/or needs adjustments or [is] just not comfortable with the hearing process/speaking in public etc.” (Respondent 103, Social Entitlement Chamber)

“I relied more on feedback from medical staff or representatives than my own observations.” (Respondent 81, Social Entitlement Chamber)

- 7.28 Multiple respondents stated that identifying vulnerability was more difficult across audio hearings because doing so relied on parties disclosing their vulnerability or disadvantage to the tribunal. A majority of respondents from the Employment Tribunals (England and Wales) who described identifying vulnerable parties as difficult, cited reliance on the party self-identifying in the absence of visual clues as an explanation for this: *“parties may not want to...tell you and harder to assess without seeing them to pick up by non-verbal clues”* (Respondent 1284, Employment Tribunals England and Wales)

- 7.29 In the Employment Tribunals (England and Wales), the absence of contact with clerks who may have a more rounded view of the parties’ abilities was also cited as a barrier to identifying vulnerability. A number of respondents called for the introduction of pre-hearing checks by court staff to ensure that vulnerability was effectively identified prior to the hearing commencing:

“No visual clues and no pre-hearing checks are being made.” (Respondent 1438, Employment Tribunals England and Wales)

“This is a real problem and Judges should always remind themselves to ensure that the administration have made proper checks on the point before the hearing begins and then to repeat the enquiry themselves in a neutral way at the outset of the hearing.” (Respondent 1445, Employment Tribunals England and Wales)

7.30 Multiple respondents noted the importance of the judge taking a pro-active role in encouraging parties to disclose vulnerability and disadvantage. Establishing rapport at the earliest possible point in proceedings was felt to be vital in order to facilitate this:

“It requires you to establish some early rapport and to question specifically. I discovered, at 3.30pm after a hearing that had started at 10am that the claimant, a single parent, was conducting the hearing from her car, outside her house; in part because it had better signal and in part to escape her two teenage children.” (Respondent 753, Health, Education and Social Care Chamber, SEND Tribunal)

7.31 Once the hearing had commenced, respondents reported that proceeding via telephone made it much more difficult to identify when parties were experiencing difficulties during the hearing. Identifying distress through voice alone was thought to be much more difficult in the absence of clues from body-language and demeanour:

“It is slightly more difficult to check parties' comprehension and that they are following the same documents as everyone else. It is difficult to check that parties are not distracted by people around them. You are dependent upon picking up from the tone of voice if someone is upset.” (Respondent 1118, Employment Tribunals England and Wales)

“Not being able to see when someone is struggling can be very difficult. In one hearing I could hear someone sobbing and thought it was the Claimant who was describing what he felt were damaging discriminatory comments and conduct. He then asked, sharply, who was mocking him. I realised it was probably a child of Counsel or the solicitor who had wandered into the room with their parent as I did not believe either of them would be doing such a thing.” (Respondent 1410, Employment Tribunals England and Wales)

“Usually signs of stress are much easier to observe by sight than over a telephone line.” (Respondent 26, Social Entitlement Chamber)

7.32 Although a lower proportion of respondents overall reported difficulties identifying when parties were vulnerable when hearings proceeded via video, a majority of respondents acknowledged that identifying disadvantage was more difficult in video hearings than in hearings conducted in person:

“Much easier than by telephone, but not as easy as in person when you will have a chance to observe the individual moving around the room and generally have a clearer view of their face. Of course, no form of hearing enables you to see invisible vulnerabilities or disabilities. That depends on them telling you or the information being in the papers.” (Respondent 1134, Employment Tribunals England and Wales)

7.33 Some respondents reported that the fact that some parties were more relaxed when able to join hearings from their own home actually masked their vulnerability, making it harder for judges to identify and address barriers to participation:

“Individuals with learning difficulties will often say they can do something when they can’t, seeing them helps as [they] often appear immature and could for example be cuddling a teddy which cannot be seen on the telephone.” (Respondent 798, Social Entitlement Chamber)

“Vulnerable persons can present as less disadvantaged when at home and they may not have had the chance to confer with their representative.” (Respondent 502, Health, Education and Social Care Chamber, SEND Tribunal)

“In Social Security cases, it is very difficult to understand the impact of a person’s disability and limitations (both physical and mental) if they cannot be seen. Very often, an appellant on the papers will present in a very different way to how they present at a hearing and the number of appeals that have been successful because of this is very high.” (Respondent 798, Social Entitlement Chamber)

7.34 A number of respondents from the Immigration and Asylum Chamber reported concerns about monitoring coercion of parties and witnesses in video hearings, and stressed that the restricted view of the parties (usually head and shoulders only) was of limited assistance in identifying vulnerability.

7.35 In the accounts provided by respondents of the experience of identifying vulnerable parties in video hearings, similar themes emerged regarding an increased reliance on the information contained within hearing papers. Respondents also reported that proceeding by video increased the importance of representatives identifying vulnerability prior to hearings.

7.36 For those respondents who reported that they had found it difficult to identify when parties were distressed or disadvantaged during video hearings, a majority attributed this to issues with the technology used to conduct hearings. Respondents reported that poor picture quality and audio made it difficult to identify when parties were struggling, undermining the potential for video hearings to address the issues experienced in telephone hearings. Further to this, respondents reported that even where parties did have a good video connection, a combination of the camera focusing on the speaker, and the requirement to conduct multiple tasks simultaneously (such as taking notes and alternating between windows) meant that parties would not always be visible to the tribunal panel, making it difficult to monitor parties’ reactions.

“CVP is clunky - if vulnerabilities are not known difficult to discover - other video platforms with better quality sound and picture would be better.” (Respondent 940, Immigration and Asylum Chamber)

“During the course of the hearing, the Judge has to take notes of what is being said and I found it difficult to watch the screen displaying all the parties on the video call at the same time as taking typed notes. It’s just not possible to view both constantly at the same time.” (Respondent 716, Immigration and Asylum Chamber)

7.37 The overlap between parties who were likely to be vulnerable or disadvantaged, and those with reduced access to technology was cited as exacerbating issues with identifying and monitoring distress and vulnerability. Respondents reported that parties with inadequate access to broadband

and technology were often forced to join their video hearing by telephone, making it impossible to monitor visual cues:

“Only 2 of 15 Kinly video hearings I have participated in allowed a patient to attend, all the rest had to attend by telephone. Even then, multiple screens means you have a small image of patient when they are not talking so impact of others’ evidence on [them] is difficult to gauge.” (Respondent 738, Health, Education and Social Care Chamber, Mental Health Tribunal)

D.2.1. Identifying vulnerability in the Health, Education and Social Care Chamber

7.38 The highest proportion of respondents who expressed concerns about their ability to identify vulnerability sat in the Health, Education and Social Care Chamber. Nearly two-thirds of respondents (59.6%, $n=559$) in the Health, Education and Social Care Chamber stated that they found it difficult to identify vulnerable parties during telephone hearings. 39.5% ($n=645$) of respondents from this chamber stated that they found it difficult to identify vulnerable parties during video hearings, the highest proportion in any of the chambers surveyed. A majority of respondents (62.0%) who had conducted audio hearings for the Mental Health Tribunal found it difficult to identify and address vulnerability in these hearings. This pattern was replicated for video hearings: over one-third of respondents (41.4%) who had conducted video hearings in the Mental Health Tribunal reported that identifying vulnerability was difficult (see Figures 7.3 and 7.4 below).

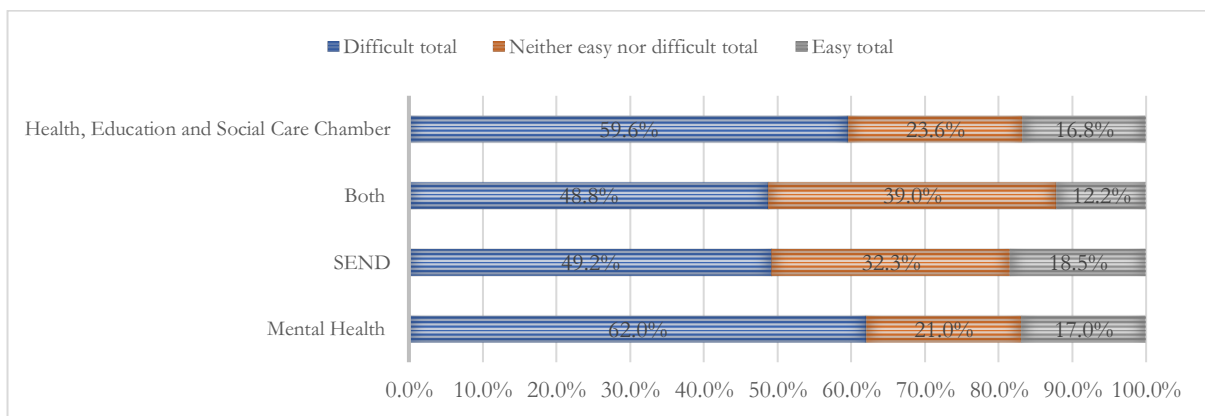


Figure 7-3: How easy is it to identify when parties are vulnerable and may require reasonable adjustments to participate during audio (telephone) hearings in the Health, Education and Social Care Chamber? ($n=559$)

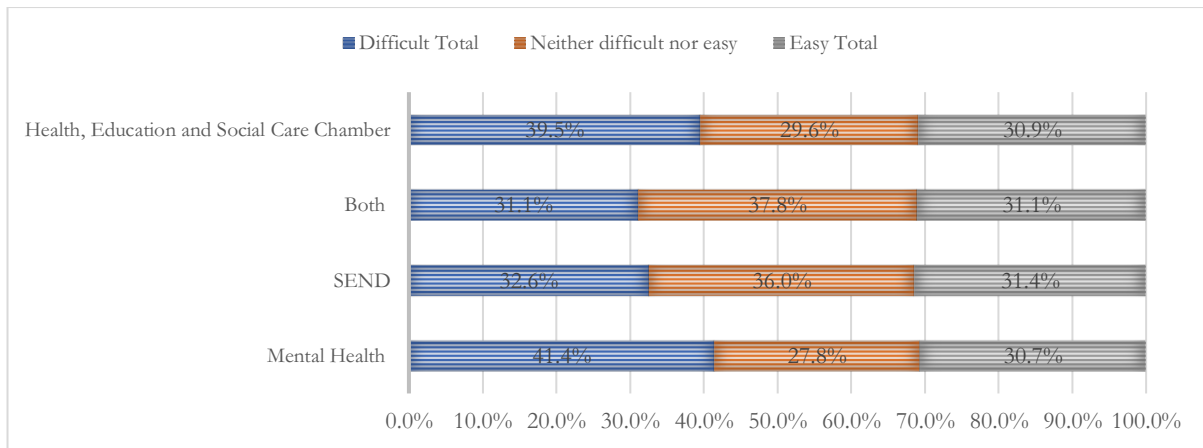


Figure 7-4: How easy is it to identify when parties are vulnerable and may require reasonable adjustments to participate during video hearings in the Health, Education and Social Care Chamber (n=645)

7.39 The withdrawal of pre-hearing examinations provides important context for these findings. Pre-hearing examinations have been described as a vital safeguard against wrongful detention and enforced treatment under the Mental Health Act.³² Pre-hearing examinations were cited by respondents as a key opportunity to gain additional information on the patient’s condition and general mental state. Respondents reported that pre-hearing examinations enabled the medical member to get a fuller sense both of how well the patient is and the level of care they are receiving. They are also an important opportunity to establish rapport with the patient. Without pre-hearing examinations, respondents reported that important information on the patient’s history cannot be gathered. Attempting to conduct pre-hearing examinations virtually was reported to be significantly less effective than in-person examinations:

“We are now dependent entirely on reports which makes assessment harder. Neither medical member nor solicitor have seen the patient in person which used to contribute to the vulnerability and risk assessments.” (Respondent 1043, Health, Education and Social Care Chamber, Mental Health Tribunal)

“The absence of pre-hearing examinations means that at the outset of hearings one is totally reliant on the written reports to gain an understanding of the patient and their circumstances. Many of them do not address the patient’s upbringing and childhood, or the emotional aspects of their lives, all of which are important to understand. A decision then has to be made during the hearing whether to leave these matters unexplored, or to enquire about potentially delicate matters.” (Respondent 110, Health, Education and Social Care Chamber, Mental Health Tribunal)

³² EHRC (2018) “Response of the Equality and Human Rights Commission to the Consultation: Proposal to amend the Tribunal Procedure (First-Tier Tribunal)(Health, Education and Social Care Chamber) Rules 2008 in relation to pre-hearing examinations, and decisions without a hearing in the case of references by the hospital or Department of Health” (June 2018) p. 1. Available at: <https://www.equalityhumanrights.com/sites/default/files/consultation-response-proposal-to-amend-tribunal-procedure-health-june-2018.pdf>.

“It is very hard to establish a rapport and use non-verbal communication techniques. The lack of a pre-hearing examination (mental health tribunal) impacts on this.” (Respondent 1086, Health, Education and Social Care Chamber, Mental Health Tribunal)

“Patient particularly difficult to engage and establish their needs. Not having PHE means they haven’t had a chance to explain anything to the panel through the medical member. They also aren’t seeing [their] solicitor face to face so solicitors don’t know what they might need all that well either.” (Respondent 1097, Health, Education and Social Care Chamber, Mental Health Tribunal)

D.2.1.1. Issues with technology implicated in issues with assessing vulnerability

7.40 Respondents reported that persistent issues with connectivity (described above at Chapter 6) made it difficult for tribunal panel members to assess when patients were vulnerable or becoming distressed in the course of their hearing. Many respondents reported that issues with connectivity were so severe that patients were forced to give up attending via video and rely on joining by phone instead, making it even more difficult to monitor how they were coping: *“The patient has only managed to join by video on a couple of occasions. Once the image kept freezing, so it was not helpful in observing the patient’s response”* (Respondent 1078, Health, Education and Social Care Chamber, Mental Health Tribunal).

7.41 In addition to issues with connectivity, respondents highlighted the inadequacy of the equipment available in in-patient settings. The lack of equipment meant that witnesses and the appellant were forced to join hearings from one shared device which was swapped between parties depending on who was speaking. As such the patient could often not be seen throughout the hearing, and could not be monitored:

“It is easier to identify when parties are vulnerable and may require reasonable adjustments if the patient is also using the video hearing platform rather than joining by phone. However, at times the same computer is used so difficulties can not be identified if we can not see the patient when others are speaking. The difficulties with the time lag and screen freezing can affect how we interpret this.” (Respondent 1043, Health, Education and Social Care Chamber, Mental Health Tribunal)

“They are sometimes not in view because the hospital arrangements mean only the witness giving evidence is within the camera lens. These hearings inevitably lack the feel you get for what is going on. That will always be the case.” (Respondent 836, Health, Education and Social Care Chamber, Mental Health Tribunal)

7.42 Other respondents reported that issues with the positioning of the equipment and the inadequacy of the visual field provided by the cameras typically used to join hearings prevented the adequate assessment of patients. Respondents stated that patients were either too far away to be seen properly, or too close to the screen to be able to adequately monitor body language for signs of fatigue or distress, as is normally possible in in-person hearings:

“Patients can be some distance from the camera and so it is extremely difficult to see what is happening. There have been many occurrences where the patient’s connectivity has broken and they have had to use audio as well as video.”
(Respondent 961, Health, Education and Social Care Chamber, Mental Health Tribunal)

“The video lens is narrow and does not provide a full picture of all participants, it is more difficult on a screen to take in the presentation of the professional witnesses and the parties, recently a participant ran out of the hearing very distressed and refused to return. When this happened we were told that her leg had been violently moving and she had been picking at her arms prior to her exit that we simply could not see and would have seen in a live hearing.”
(Respondent 943, Health, Education and Social Care Chamber, Mental Health Tribunal)

D.2.1.2. Difficulties providing reasonable adjustments for parties

7.43 A number of respondents reported that even where it was possible to identify that reasonable adjustments might be required, limitations in both the technology and the facilities provided for the conduct of hearings in in-patient settings meant that these were practically difficult to implement:

“It is not difficult to identify but difficult to rectify. We had to adjourn a hearing for a hearing-impaired parent due to limitations in the technology.” (Respondent 827, Health, Education and Social Care Chamber, Mental Health Tribunal)

“Reasonable adjustments are sometimes difficult as the panel is often reliant on the hospital staff making the adjustments on our advice.” (Respondent 796, Health, Education and Social Care Chamber, Mental Health Tribunal)

7.44 Others remarked that the physical restrictions imposed by measures to tackle the spread of COVID-19 made it very difficult to put in place effective adjustments that would normally be used to reduce distress in vulnerable patients, for example, enabling them to sit next to their solicitor or supporting relative:

“It is also difficult to make reasonable adjustments as for example it was often helpful for the patient to be sitting next to their solicitor or supporting relative which can’t happen now. The reports are not able to be as thoroughly gone through with the patient so they are more upset it seems by what they are hearing.” (Respondent 1043, Health, Education and Social Care Chamber, Mental Health Tribunal)

D.2.1.3. Mode of hearing exacerbating patient’s symptoms

7.45 A number of respondents reported that proceeding with hearings by video or telephone risked exacerbating patient’s symptoms, particularly where they were suffering from psychosis. It was reported by respondents that this had led to increased numbers of patients leaving their hearings part-way through or declining to attend in the first place:

“Hard to know how the patient is reacting and read cues. Sometimes the actual technology adds to the patient’s paranoia as they are suspicious about electrical devices to begin with. There have been proportionately more walk outs compared to normal face to face hearings. Also, many patients have not met their reps in person, which can add to

their anxiety and lack of trust.” (Respondent 556, Health, Education and Social Care Chamber, Mental Health Tribunal)

“It is not easy when some witnesses cannot be seen, and others are trying to use a phonenumber. It is particularly difficult for patients if they are faced by a series of faces and voices, especially if they are psychotic.” (Respondent 837, Health, Education and Social Care Chamber, Mental Health Tribunal)

- 7.46 Other respondents reported that remote hearings posed particular issues for patients with learning difficulties. This mirrors the findings of a recent review conducted by the EHRC into the impact of remote hearings on neurodivergent offenders in the criminal justice system, which suggested that proceeding with video hearings where offenders are neuro-divergent results in lower levels of participation, and as such, threatens access to justice:³³

“Difficulties arise when an applicant has autism, learning difficulties. I have had some applicants who have simply refused to participate.” (Respondent 1236, Health, Education and Social Care Chamber, Mental Health Tribunal)

“Patients with learning difficulties have problems being able to engage in either a telephone or video hearing whereas they have been able to engage in a physical hearing.” (Respondent 19, Health, Education and Social Care Chamber, Mental Health Tribunal)

D.2.1.4. Risks to staff and patients during remote hearings

- 7.47 The difficulties remote hearings (both telephone and video) present in terms of assessing parties’ demeanour are of particular salience in the context of mental health hearings. Failure to monitor whether patients are becoming distressed or agitated as a consequence of proceedings can put both patients and staff at risk. A number of respondents reported concerns that proceeding with hearings remotely meant that they were unable to gauge when patients were becoming distressed:

“Often pick up on patients becoming agitated later than you would do in a physical hearing. Same with applicants. Can’t see them becoming upset.” (Respondent 685, Health, Education and Social Care Chamber, Mental Health Tribunal)

- 7.48 A number of respondents reported experiences where patients had, unbeknownst to the panel, become very distressed during hearings and reacted with expressions of physical violence as a consequence. Other respondents reported concerns for the safety and wellbeing of nursing staff who were tasked with supporting patients to access remote hearings:

³³ EHRC (2020) “Inclusive justice: a system designed for all- Interim evidence report, Video hearings and their impact on effective participation.” Available at: https://www.equalityhumanrights.com/sites/default/files/inclusive_justice_a_system_designed_for_all_interim_report_0.pdf.

“It is very hard to judge the emotional temperature in the room remotely. In one hearing, it was not realised that the patient was becoming distressed listening to the judgment until he leapt up and began punching the door. It felt like a very unsafe situation as there were other people in the room with the patient but they were unable to leave.”

(Respondent 227, Health, Education and Social Care Chamber, Mental Health Tribunal)

“You are less able to build rapport with the patient and monitor their frustration/distress as the hearing proceeds... We have had to conduct hearings where either nurse or care coordinator has had to sit next to the patient in order to facilitate access for the patient which has placed that person at risk. On one occasion, the nurse told the Panel that she didn’t feel safe with the patient next to her in an otherwise unmanned office, but he turned up unannounced and she felt compelled to “make the best of it” and the panel could not see her or the patient.”

(Respondent 885, Health, Education and Social Care Chamber, Mental Health Tribunal)

D.3. The impact of remote hearings on levels of representation

- 7.49 Access to advice and representation plays a critical role in supporting participation and ensuring that hearings are fair and effective. When the issues involved in a case are too factually or legally complex for an individual to present their case effectively, the courts have recognised a requirement for representation and legal aid (see for example, *R(Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710).
- 7.50 Representatives can play a key role in supporting the tribunal to identify when parties are vulnerable and may require reasonable adjustments to participate. A majority of respondents also reported that hearings where parties are represented are easier to conduct remotely. For this reason, understanding the impact of the rapid expansion of remote hearings on the number of parties who are represented is of critical importance.
- 7.51 Across all chambers, the majority of respondents reported that the number of parties who are represented by a lawyer or advice worker was unaffected by the transition to remote hearings. 75.2% of respondents ($n=1393$) reported that they had observed no difference in the number of parties who were represented in telephone hearings, and 86.9% of respondents ($n=968$) reported that they had observed no difference in the number of parties who were represented in video hearings.
- 7.52 A minority of respondents in the Immigration and Asylum Chamber (where respondents reported that levels of representation are normally high) stated that the number of parties who were represented had risen in light of the transition to remote hearings, as representatives found it easier to attend.

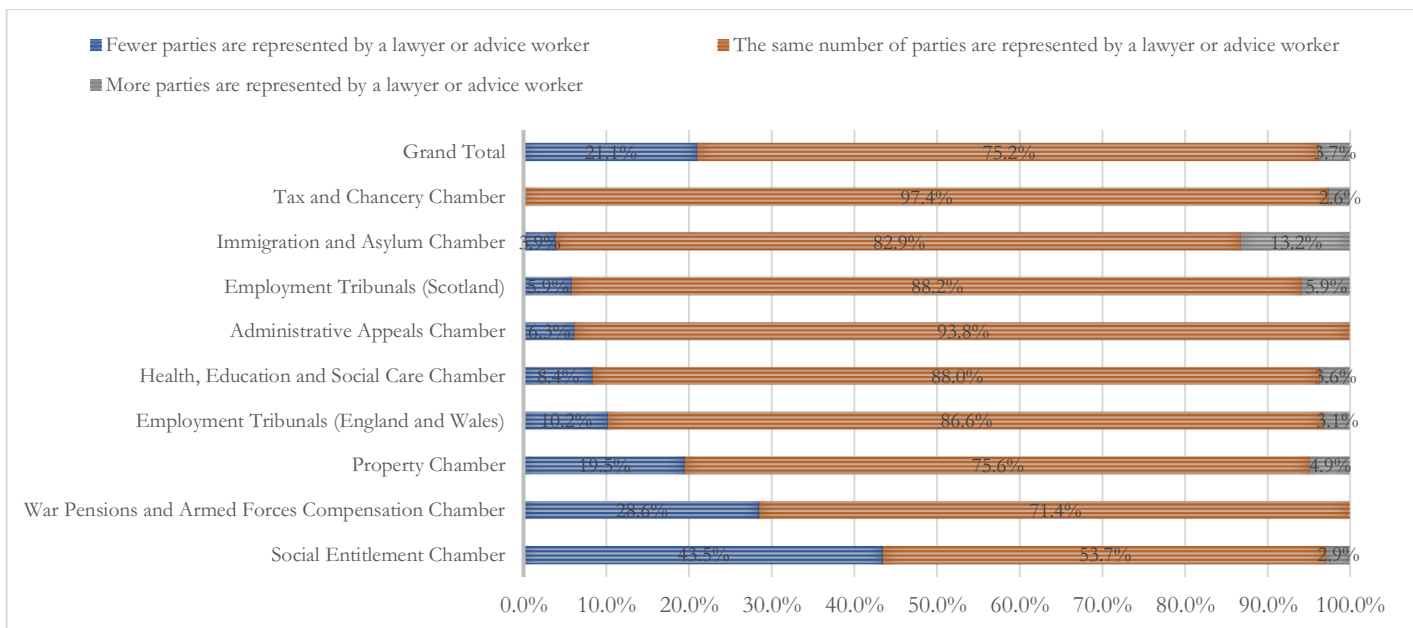


Figure 7-5: In your view, how has proceeding with hearings by telephone impacted on the number of parties who are represented e.g. by a lawyer or advice worker? (n=1393)

7.53 Reductions in levels of representation in telephone hearings were reported in those chambers where parties tend to rely on representation from charities and advice agencies. 43.5% of respondents from the Social Entitlement Chamber (n=490) reported that the transition to telephone hearings had resulted in fewer appellants being represented.

7.54 Some respondents implicated the financial impact of the pandemic on advice agencies in the reduction in levels of representation. Respondents reported that the pandemic had led to advice agencies closing, reducing their services and furloughing staff, reducing access to advice and representation for appellants:

“Advice workers have been furloughed and so don’t attend.” (Respondent 219, Social Entitlement Chamber)

“I have had some hearings where the appellant has a representative, but the representative hasn’t been able to be a part of the hearing, this has been because of issues with the representative not working during the pandemic (i.e. [they] have been furloughed).” (Respondent 245, Social Entitlement Chamber)

7.55 Other respondents reported that advice agencies were not set up to provide advice and representation remotely,³⁴ or that poor access to the equipment necessary to facilitate remote working meant that representatives were uncontactable. In these cases, respondents reported that

³⁴ This is supported by pre-COVID AJC research into the ability of the advice sector to support clients through digital court processes. See: Sechi, D. (2020) “Digitisation and Accessing Justice in the Community” Administrative Justice Council available at: <https://ajc-justice.co.uk/wp-content/uploads/2020/04/Digitisation.pdf>

appellants tended to proceed with the hearing, even if this placed them at a disadvantage, from a desire to “get the hearing over with”:

“Often we are unable to contact the appellants' representative or advice/support worker. The appellant may be being disadvantaged although they often want to proceed with the hearing just to get it over with.” (Respondent 15, Social Entitlement Chamber)

“Difficulties in being able to contact representatives as most are working from home and we don't have mobile or home numbers. Sometimes we have continued with a hearing although the representative has not been contactable. The appellant has often agreed to continue with the hearing but that may be because they want to get it over with. Often the tribunal is unable to contact an advice worker. We sometimes only have their office number which hasn't been diverted to their home or mobile number. Sometimes the appellants have not been able to contact Royal British Legion or another organisation to request representation for themselves.” (Respondent 28, War Pensions and Armed Forces Chamber)

“A number of agencies have closed their offices and no longer provide a service during this period. It has also proved difficult at times to contact reps despite their having given telephone numbers, email addresses. There has been a considerable drop in representative participation in hearings. It used to be a regular thing for reps to attend, but now it is very rare.” (Respondent 55, Social Entitlement Chamber)

- 7.56 In some cases, respondents reported that issues with the technology and processes available to support telephone hearings meant that representatives were unable to attend. Multiple respondents implicated limits on the number of callers who were able to join hearings, and problems with ensuring that representatives had access to hearing bundles, which could not be issued remotely:

“In the early months we were restricted to the number of callers on the line so were told Representatives could not join the call. This has improved recently but some Reps haven't got bundles as we won't issue them electronically and if their offices are closed they can't get paper bundles either.” (Respondent 240, Social Entitlement Chamber)

- 7.57 Some respondents reported that the decrease in representation was a consequence of representatives refusing to take part in hearings and advising clients to do the same on the basis of concerns about the fairness of hearings conducted by telephone. This requires further investigation:

“In some areas representatives seem happy to take part and in other areas they don't seem to even try which I think is unfortunate for their appellants.” (Respondent 248, Social Entitlement Chamber)

“Some Welfare Rights Agencies are refusing to participate in remote hearings and are advising Appellants to do the same, this has already resulted in some of my sessions being at least in part unproductive.” (Respondent 52, Social Entitlement Chamber)

“There appears to have been a view (at least initially) by professional reps that telephone hearings were to be avoided and they refused to participate. However this position has softened slightly in recent months.” (Respondent 358, Social Entitlement Chamber)

7.58 Similar patterns in relative levels of representation emerged in the context of video hearings. 40.7% ($n=91$) of respondents from the Social Entitlement Chamber reported that fewer parties were represented by a lawyer or advice worker during hearings, due to the barriers to attendance described above in relation to telephone hearings.

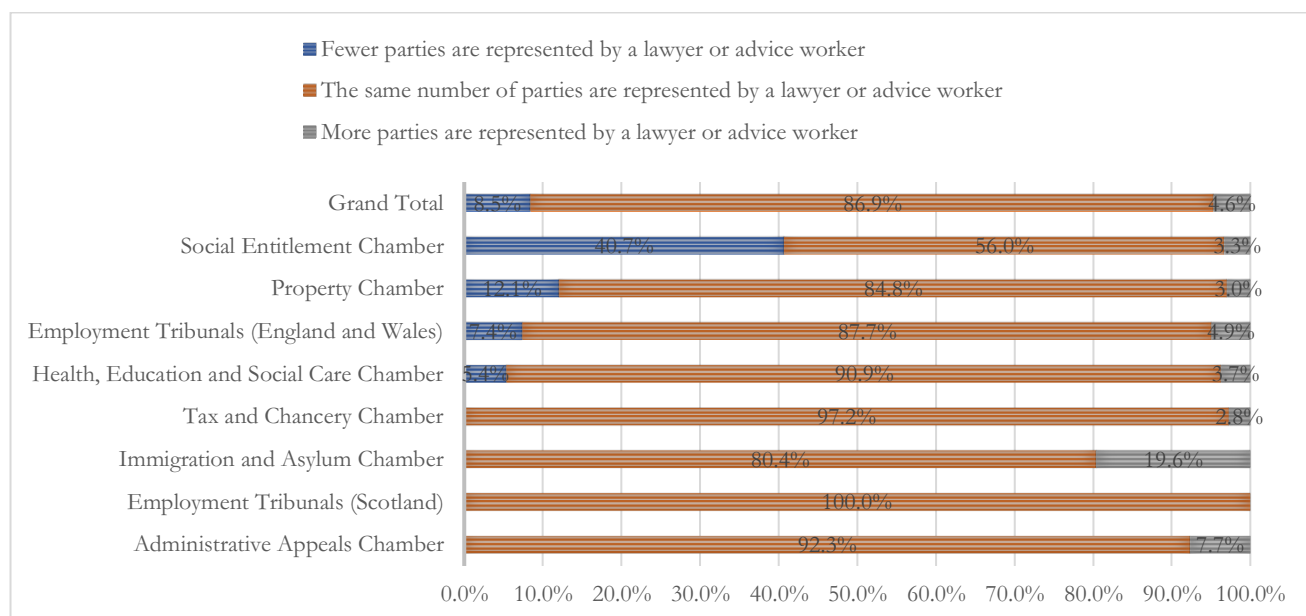


Figure 7-6: In your view, how has proceeding with hearings by video impacted on the number of parties who are represented, e.g. by a lawyer or advice worker? ($n=968$)

D.4. The impact of remote hearings on effective communication

7.59 The Equal Treatment Bench Book defines “effective communication” as a process through which “everyone involved [in the legal process] understands and is understood...Understanding means understanding the evidence, the materials, the process, the meaning of questions and the answers to them.”³⁵ In the absence of effective communication, the Equal Treatment Bench Book argues: “the legal process will be impeded or derailed”.³⁶

7.60 Overall, nearly half of respondents (46.6%, $n=1371$) reported that it was easy or very easy to communicate with parties during telephone hearings. The proportion of respondents who reported that it was very easy or easy to communicate with parties fell slightly in the context of video hearings, to 41.2% ($n=1036$). However, over one quarter of respondents reported that it was difficult or very difficult to communicate with parties during telephone hearings (28%, $n=1371$), and nearly one third of respondents stated that it was difficult or very difficult to communicate with parties during video hearings (31.7%, $n=1036$). Respondents reported that the rapid expansion of remote hearings

³⁵ Judicial College (2018) “Equal Treatment Bench Book” (March 2020 revision) p. 4. Available at: <https://www.judiciary.uk/wp-content/uploads/2020/05/ETBB-February-2018-amended-March-2020-17.09.20-1.pdf>.

³⁶ *ibid.*

impacted both positively and negatively on the technical, practical and psychological barriers to communication between parties and judicial office holders.

- 7.61 Experience diverged significantly between and within chambers (see Figure 7.7 below). Overall, the highest proportion of respondents who found it difficult or very difficult to communicate with parties during telephone and video hearings reporting sitting in the Health, Education and Social Care Chamber (although experiences varied considerably between those who sat in the SEND Tribunal and those who sat in Mental Health). The experience of respondents in this chamber is discussed at section D.4.5. below.

D.4.1. The impact of telephone hearings on practical barriers to communication

- 7.62 The performance of the technology used to conduct remote hearings was a key factor in determining respondents' perceptions of the ease with which they could communicate with parties. The vast majority (87.9%) of respondents from Employment Tribunals (Scotland) stated that they had found it easy or very easy to communicate with parties during telephone hearings. A majority of respondents in this chamber reported that connecting with parties had been unproblematic, and that the quality of the audio had been good.
- 7.63 In contrast, respondents from the Social Entitlement Chamber were less positive about their experience with telephone hearings. Over one fifth of respondents (22.1%) in this chamber described their experience of communicating with parties as difficult or very difficult. Explanations for this included poor sound quality, interference on the line, low speaker volume, background noise and the distortion of voices, making it difficult to identify which parties were speaking. Respondents reported that hearings had been disrupted by poor quality connections and by appellants losing mobile phone signal. The low quality of equipment available to appellants was also implicated in these failures:

“Calls have dropped out with appellants or judicial members having to dial back in. This wastes time, interferes with flow and affects concentration.” (Respondent 142, Social Entitlement Chamber)

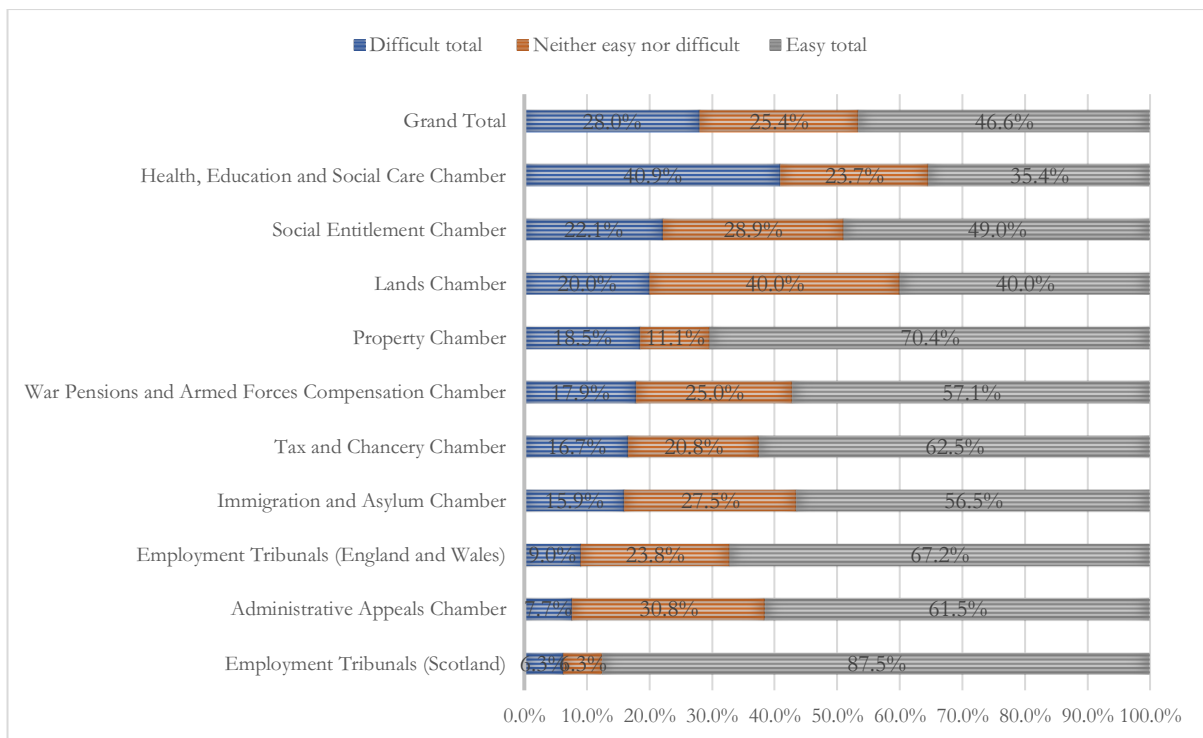


Figure 7-7: How easy is it to communicate with parties during audio (telephone) hearings? (n=1371)³⁷

7.64 Particular practical barriers to communication were reported in telephone hearings involving interpreters (this finding was consistent across all chambers). Many respondents noted that hearings where parties required an interpreter took longer and were harder to conduct. A number of respondents raised concerns about the impact proceeding with a hearing by telephone had on the accuracy of interpretation:

“Party using remote interpreter was a challenge. Every word had to be translated.” (Respondent 215, Property Chamber)

“Hearings with interpreters are slow and difficult.” (Respondent 246, Social Entitlement Chamber)

“Difficult to hear each other at times, where interpreters, real risk of confusion or inaccuracies.” (Respondent 65, Immigration and Asylum Chamber)

7.65 Respondents reported issues with judging when parties had finished speaking when hearings proceeded by telephone, which led to parties talking over each other and undermined effective communication. To respond to this, many respondents resorted to muting parties when they were not speaking, which had the unintended consequence of making it harder for parties to effectively raise concerns when they were having difficulty following proceedings:

³⁷ Please note, chambers with fewer than 10 respondents were excluded from this analysis.

“The hearings do not flow easily, people are more likely to talk over each other inadvertently and a lot has to be repeated, things do get done but it is harder work for all concerned.” (Respondent 193, Immigration and Asylum Chamber)

“If participants are muted to avoid unnecessary noise it can be difficult for them to interject as they might at a normal hearing.” (Respondent 793, Property Chamber)

“Much harder with vulnerable litigants in person, especially if there is any loss of sound quality. It is hard without any visual cues as to whether someone is listening, wants to say something, is unhappy, is taking notes etc. Asking people [to] mute to cut out background sound when they are not talking deprives you of all the oral cues we are used to - quiet murmurs of agreement or disagreement and indicators that someone is listening. We normally work very hard to communicate well with LIPs and ensure they get a fair hearing, but some of that is lost when dealing remotely.” (Respondent 1163, Employment Tribunals England and Wales)

D.4.2. The impact of telephone hearings on psychological barriers to communication

7.66 Views of the impact of proceeding with hearings by telephone on emotional barriers to participation varied considerably. A number of respondents reported that proceeding with hearings by telephone had improved the quality of communication between the panel and parties, as parties were more relaxed in their own surroundings:

“In some ways appellants have been more relaxed. They haven’t had to travel to a court and they don’t sit opposite a slightly daunting panel. Some appellants have done better than at a physical hearing.” (Respondent 346, Social Entitlement Chamber)

7.67 Some respondents in the Social Entitlement Chamber also observed that in their experience appellants had found it easier to talk about personal topics, such as the impact of their particular health condition on their day-to-day life, when they were not required to sit with an unfamiliar panel in person:

“So far the Appellants and their companions have said that they felt they were given a chance to say everything they needed to and one Appellant found the telephone hearing preferable to having to discuss the intimate nature of their conditions in person at a hearing venue.” (Respondent 103, Social Entitlement Chamber)

7.68 However, other respondents felt that proceeding with hearings by telephone made it harder to encourage parties to communicate their position effectively. It was also observed that the absence of visual cues made it harder to convey empathy and build trust, which are critical to ensuring effective communication:

“Just because all parties can hear each other clearly does not guarantee that they are succeeding in conveying information to each other as they would wish it to be understood. For example, when an Appellant wanders off topic, it is easier to bring them back to the topic in a face-to-face situation because they can see that the Tribunal members are listening with interest and empathy and that the Tribunal’s effort to get them back on track is not adversarial. Having to rely

solely on choice of words and tone of voice to engage an Appellant in a conversation is much more difficult and such action can be easily misunderstood to be disinterest or 'muzzling' on the part of the Tribunal. Tribunal members haven't received any training about issues to be aware of in telephone encounters or ways to adjust their manner to optimise telephone dialogues with Appellants." (Respondent 200, Social Entitlement Chamber)

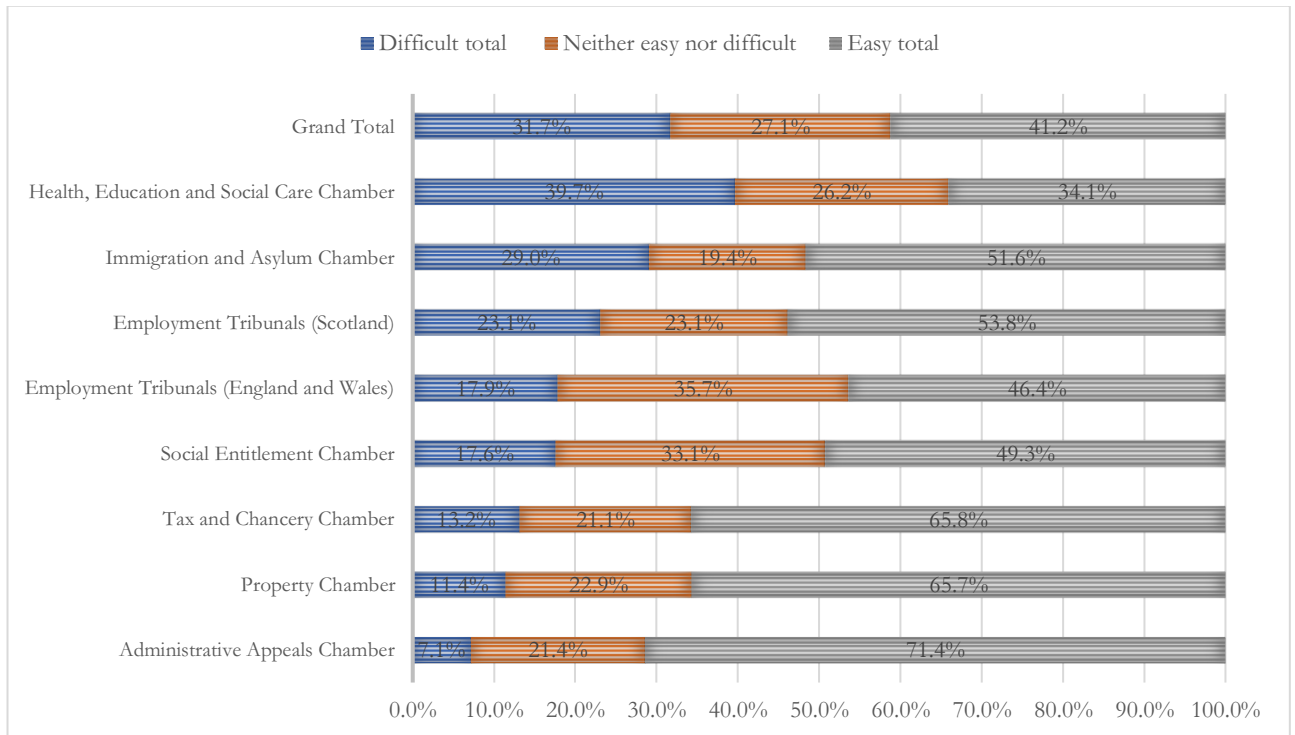


Figure 7-8: How easy have you found it to communicate with parties during video hearings? (n=1036)

D.4.3. The impact of video hearings on practical barriers to communication

7.69 Overall, a slightly higher proportion of respondents stated that it was very difficult or difficult to communicate with parties during video hearings than in audio hearings (31.7%, n=1036). This may be attributed to the heightened potential for technical difficulties to occur when hearings proceed by video. In the Administrative Appeals Chamber, a majority of respondents (71.4%, n=14) reported that it was easy to communicate with parties during video hearings—this was attributed to the fact that the majority of hearings dealt with by respondents featured representatives only, who are familiar with hearings and have good access to technology. Similarly in the Property Chamber, respondents reported a low incidence of technical issues, which meant that communication difficulties were minimised (65.7%, n=35).

7.70 Conversely, respondents from the Immigration and Asylum Chamber, which deals with a higher proportion of vulnerable parties, reported issues with internet connections undermining communication—even minor issues were experienced as a disruption to proceedings. As with telephone hearings, respondents reported that hearings involving interpreters presented a higher degree of difficulty in terms of ensuring that effective communication could take place.

“This varies but when technical issues arise it can take a lot of time to sort out. Again they require significant levels of concentration and the tendency of people to talk over each other does not help.” (Respondent 193, Immigration and Asylum Chamber)

“Lots of connection problems. Difficulties using interpreters.” (Respondent 804, Immigration and Asylum Chamber)

“In court hearings, where the interpretation process is impaired (e.g. the Appellant doesn't pause during an answer to permit the interpreter to interpret and just keeps talking so that there is just too much information for the interpreter to remember and interpret), it is easy for the Tribunal member to intervene and remind the Appellant of interpreting protocols.” (Respondent 200, Social Entitlement Chamber)

- 7.71 Respondents also reported issues with time “lags” or delays or disconnections between audio and video that disrupted the flow of hearings and made it harder to prevent parties from talking over each other, undermining the effectiveness of communication:

“There are still some audio/video glitches with CVP (such as desynchronisation of audio and video) and it is still difficult to prevent talking over each other.” (Respondent 955, Immigration and Asylum Chamber)

D.4.4. The impact of video hearings on psychological barriers to participation

- 7.72 A number of respondents reported that in the absence of technical issues, video hearings could diminish emotional barriers to participation by reducing the stress involved in travelling to an unfamiliar court venue and appearing in front of a panel. Respondents suggested that some parties were more relaxed in their own surroundings and therefore better able to communicate when hearings proceeded by video:

“If there are no technical issues, the appellant's ability to communicate and give evidence should be no worse than actually at a hearing venue. Indeed, some appellants might be a bit more relaxed and less anxious in their own home settings, and potentially able to give their best evidence.” (Respondent 1252, Social Entitlement Chamber)

“It's a good option to have for those who may be too anxious to attend physically for whatever reason.”
(Respondent 432, Social Entitlement Chamber)

“Providing parties have access to a reliable broadband connection and have adequate technology, they are just as effective as F2F (if not better, as it avoids the need of the parties to travel to a hearing centre, which is a significant consideration). But the need for decent technology is an important factor.” (Respondent 703, Tax and Chancery Chamber)

- 7.73 Conversely, other respondents felt that it was harder to support anxious parties when hearings took place remotely, and further, that appellants may face additional struggles when attempting to communicate or intervene. Respondents reported difficulties in knowing when parties wished to speak, and further, that the requirement on the judge to monitor the virtual hearing environment

could distract them from attending to parties’ needs in the same manner that they would be able to in a physical hearing:

“The image is not always clear, as a Judge, concentration on all which is going on is very demanding and visual cues are missed and verbal cues not heard when the person is muted.” (Respondent 20, Social Entitlement Chamber)

“It is more difficult to monitor how well an anxious appellant is coping.” (Respondent 949, Immigration and Asylum Chamber)

“It is difficult to know who wishes to speak; parties have had difficulty joining; parties sometimes disappear from the hearing and have to rejoin.” (Respondent 1265, Immigration and Asylum Chamber)

D.4.5. The impact of remote hearings on communication in the Health, Education and Social Care Chamber

7.74 The practical and emotional advantages and disadvantages of remote hearings in terms of promoting communication were magnified in the experience of respondents from the Health, Education and Social Care Chamber. Overall, 40.9% ($n=579$) of respondents from this chamber reported that they found it difficult or very difficult to communicate with parties during telephone hearings, and 39.7% ($n=648$) of respondents found it difficult or very difficult to communicate with parties during video hearings (see Figures 7.9 and 7.10).

7.75 This overall figure masked significant divergences in experience between respondents in the SEND Tribunal and those in the Mental Health Tribunal. In the SEND Tribunal, the percentage of respondents who found it difficult or very difficult to communicate with parties in telephone hearings was just 16.9%, compared with 46.3% in the Mental Health Tribunal. Similarly, just 15.6% of respondents in the SEND Tribunal reported that they found it difficult to communicate with parties during telephone hearings, compared with 44.5% of respondents in the Mental Health Tribunal. The reasons for this are explored below.

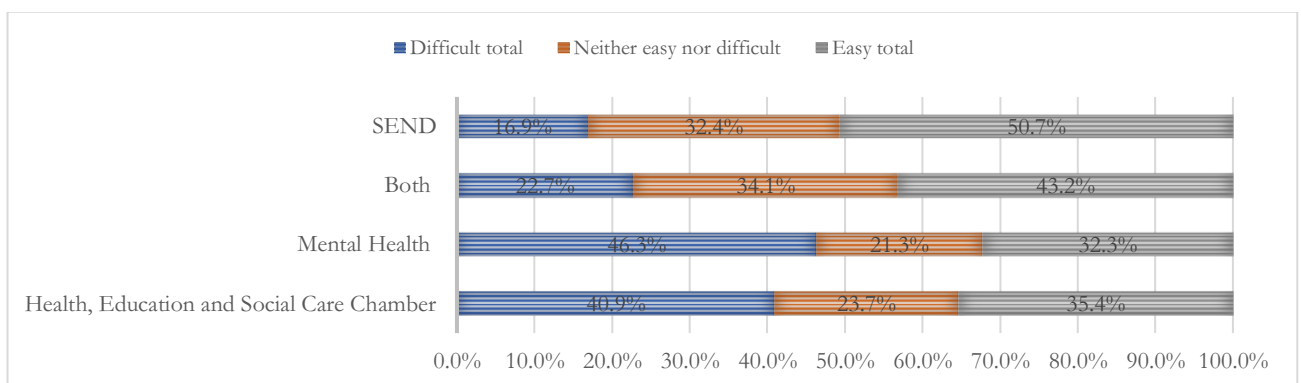


Figure 7-9: How easy is it to communicate with parties in the Health, Education and Social Care Chamber during audio (telephone) hearings? ($n=579$)

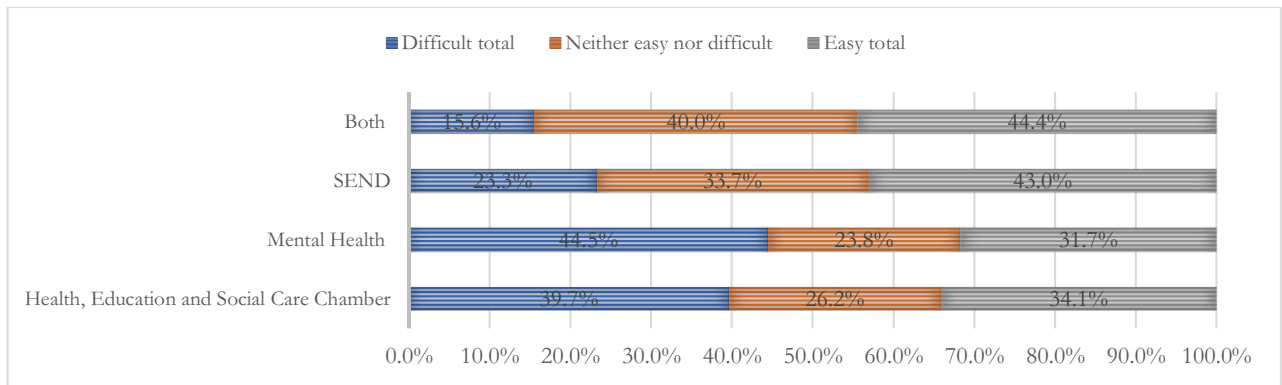


Figure 7-10: How easy have you found it to communicate with parties in the Health, Education and Social Care Chamber during video hearings? (n=648)

7.76 In contrast to the experience of respondents in the Mental Health Tribunal, respondents from the SEND Tribunal reported experiencing fewer and more minor issues with the technology to support telephone and video hearings:

“Generally where all parties have a good connection, communication is good.” (Respondent 4, Health, Education and Social Care Chamber, SEND Tribunal)

“Although can be hampered by connection issues which cause a real lack of momentum. When everything is working they are great.” (Respondent 326, Health, Education and Social Care Chamber, SEND Tribunal)

“Very easy once connection is established and provided the quality of the party's wifi and signal is good. Can be more difficult with individuals where they are only connecting by audio or their signal is weak and their reception is patchy leading to breaking up, freezing and loss of connection. Overall the experience in the hearings in which I have participated the communication has been easy.” (Respondent 756, Health, Education and Social Care Chamber, SEND Tribunal)

7.77 Whilst respondents from the SEND Tribunal did report issues relating to diminished ability to assess non-verbal cues, these concerns were balanced against the perceived benefits provided by remote hearings. Where difficulties with technology were experienced, they were described as being outweighed by the practical and emotional benefits of proceeding with hearings in this way. Many respondents in the SEND Tribunal reported that parties were more relaxed at home and better able to communicate:

“I think that because parties generally feel more relaxed at home, rather than in a formal tribunal/ court room, they feel comfortable about participating, explaining, asking questions etc.” (Respondent 30, Health, Education and Social Care Chamber, SEND Tribunal)

“My impression is that parents, especially if unrepresented, have found video hearings less stressful and generally easier to participate in on an equal footing.” (Respondent 329, Health, Education and Social Care Chamber, SEND Tribunal)

“As a vital measure to continue to hear important cases regarding the future SEND provision for children and young people, the exercise has been successful. There have been advantages for parties in terms of generally being more relaxed in their homes, less travel time and time commitment of their witnesses and similarly for panellists in terms of travel time and length of the working day. However, the overall effectiveness of some hearings has been less due to varied connection problems, quality of evidence, difficulty manipulating sizeable electronic bundles effectively and quickly enough, home based IT not being advanced enough and overall hearings taking a lot longer than a face to face hearing leading to more adjournments and delay. It is a balancing exercise though because if more appellants can participate and be enabled to do so and more cases can be heard then this may outweigh the difficulties and challenges experienced.”
(Respondent 776, Health, Education and Social Care Chamber, SEND Tribunal)

- 7.78 In contrast to the experience in the SEND Tribunal, respondents from the Mental Health Tribunal consistently reported persistent and endemic issues with access to reliable technology for parties. In some cases, these issues formed an absolute barrier to communicating with patients, whilst in others, they resulted in patients being forced to join their video hearing by telephone whilst other parties were visible on video, creating a real risk of unfairness:

“Some audio hearings were like sitting in the same room as the participants, but with your eyes closed. Most were not. Some were like sitting on the central reservation of a motorway and shouting at passing cars. There is an obvious risk of injustice - particularly where [the] patient is concerned in MH cases when either using audio by choice, or video fails and hearing switches to audio. On one occasion I began to have real concerns about the fairness of the process. I believe I was able, by objective standards, to make the hearing fair - but I do not like the feeling that the effectiveness of justice is in the balance.” (Respondent 750, Health, Education and Social Care Chamber, Mental Health Tribunal)

“Sometimes the patient and nurse together have been unable to join with a video connection and so have to phone in. They are significantly disadvantaged by this situation. There are no visual clues and you are reliant on the nurse explaining what is happening, which they do not do as they are concerned to ensure the patient is safe in the first instance and later may not report what has happened in an unbiased manner. In one case where a patient was on the telephone, only at the end of a hearing did I become aware the patient had not been given a pen and paper to make notes with, he was not represented and was in a room alone. After that I always made sure the patient had such materials but this regularly delayed matters as no one had thought to offer them.” (Respondent 914, Health, Education and Social Care Chamber, Mental Health Tribunal)

- 7.79 The combination of issues with access to technology and the lack of appropriate space from which to join hearings in in-patient settings was further felt to undermine the ability of the panel to effectively communicate with patients during hearings:

“Connectivity often an issue. Also patients usually in rooms that echo with significant background noise, sharing computer with a nurse, with mask on, all can make it virtually impossible to hear the evidence.” (Respondent 226, Health, Education and Social Care Chamber, Mental Health Tribunal)

7.80 Respondents reported that the net impact of the multitude of technical difficulties experienced in the conduct of remote hearings in the Mental Health Tribunal was to increase the duration of hearings. This in itself posed a barrier to communication with patients who were unable to cope with long hearings, and left before they concluded:

“Only [in] 1/18 hearings I have done did the patient remain because they can last around 5-7 hours.” (Respondent 1004, Health, Education and Social Care Chamber, Mental Health Tribunal)

“One hearing required the use of a language interpreter. Due to Covid-19 restrictions the interpreter worked from home and was not sat with the patient (who required the interpreter). It was necessary for every sentence (or part of a sentence) to be translated. This doubled the bearing time from 2 hours to 4 hours. It was very difficult to concentrate and follow.” (Respondent 1196, Health, Education and Social Care Chamber, Mental Health Tribunal)

7.81 In addition, respondents reported that the confusion created by a combination of technical difficulties, inadequate facilities for conducting hearings and the absence of supporters and representatives for patients who would normally sit alongside patients resulted in a chaotic environment. This led to confused patients attempting to interject at inappropriate points during hearings, which could only be managed through “muting”. Once muted, it was very difficult for patients to indicate when they wished to be heard, and for the panel to monitor whether patients were able to understand what was happening during the hearing:

“The applicants, who are patients in mental health tribunals, have often found it very difficult to understand what is going on and who is talking in telephone hearings. In video hearings they have often found it hard to hear or have kept interrupting so have had to be muted in order to make the evidence of others audible. Both these things have been very frustrating for them and in my view have not provided the environment necessary for a fair hearing.”

(Respondent 36, Health, Education and Social Care Chamber, Mental Health Tribunal)

“...the lack of visual cues for such patients and bad quality sound made it really hard for them to participate and for reasonable adjustments to be made. It's much easier to see if someone is having difficulties in participating if you can see them - but given that you had to mute anyone that was not speaking it was impossible to tell how they were getting on during the hearing.” (Respondent 140, Health, Education and Social Care Chamber, Mental Health Tribunal)

7.82 Further barriers to communication were presented by the tendency for the mode of hearing to compound the symptoms of patients who were attempting to participate. Many patients, particularly those with paranoia or psychosis, experienced confusion during hearings, preventing them from understanding what was happening to them:

“Most people are not comfortable with the tech. They are not relaxed and may find communication difficult or embarrassing. The latency in video adds to this and can cause confusion.” (Respondent 939, Health, Education and Social Care Chamber, Mental Health Tribunal)

“Due to sound and connection problems the hearings have been disjointed and difficult to conduct. It is not easy when some witnesses cannot be seen, others are trying to use a phone line. It is particularly difficult for the patients especially if they are faced by a series of faces and voices especially if they are psychotic. Also very difficult with an interpreter who is not in the same room as the patient.” (Respondent 837, Health, Education and Social Care Chamber, Mental Health Tribunal)

D.5. The impact of telephone hearings on the ability of parties to effectively present their case

7.83 Overall, 53.8% ($n=1336$) of respondents felt that telephone hearings were mostly effective or effective in enabling parties to participate and put their case, although, as above, experience varied significantly between chambers. Over one third of respondents overall (35.7%, $n=1336$) stated that telephone hearings were slightly ineffective or ineffective.

7.84 Interestingly, the Social Entitlement Chamber contained the second-lowest proportion of respondents who felt that telephone hearings were slightly ineffective or ineffective. Explanations for this included that appellants were more relaxed and therefore better able to put their case when they appeared by telephone:

“Most appellants appear comfortable giving information over the phone and perhaps find it less intimidating than a face to face hearing.” (Respondent 33, Social Entitlement Chamber)

“My experience is that appellants have engaged much better.” (Respondent 38, Social Entitlement Chamber)

7.85 Where concerns were raised, these tended to relate to the ability of the panel to assess credibility due to a lack of visual clues; appellants not being able to see the panel and therefore being ill at ease; the inability to assess the functional impact of the appellants’ diagnoses; and the physical separation between parties and interpreters, and parties and representatives during the hearing.

7.86 Some respondents raised concerns that the decreased formality of telephone hearings meant that appellants viewed the hearing as less consequential or final, and as such, did not present their best case:

“I also think some Appellants find the hearing has less formality or importance. We are meant to be less formal than other proceedings but occasionally all formality goes out of the window and Appellants behave as though having a chat with an acquaintance. That is exacerbated when they can’t see the panel.” (Respondent 240, Social Entitlement Chamber)

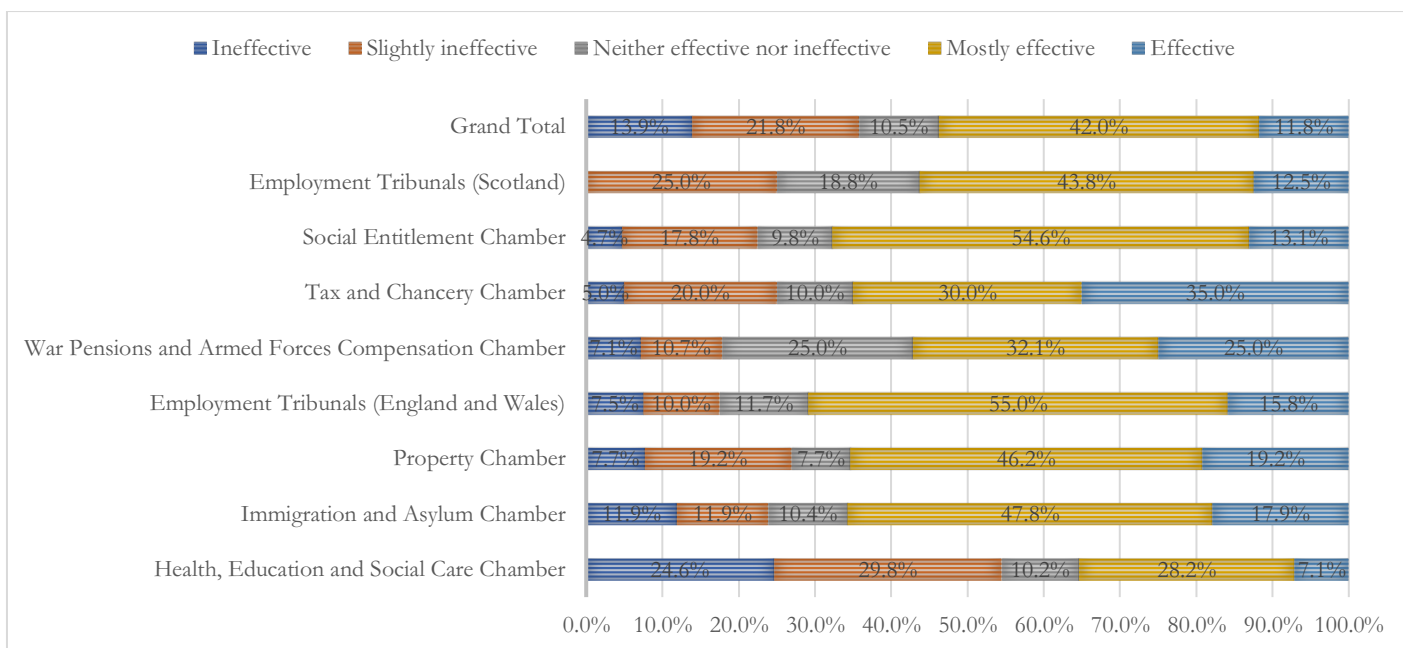


Figure 7-11: Thinking back on your overall experience of audio (telephone) hearings, would you say that telephone hearings are effective or ineffective in terms of allowing parties to participate and put their case? (n=1336)

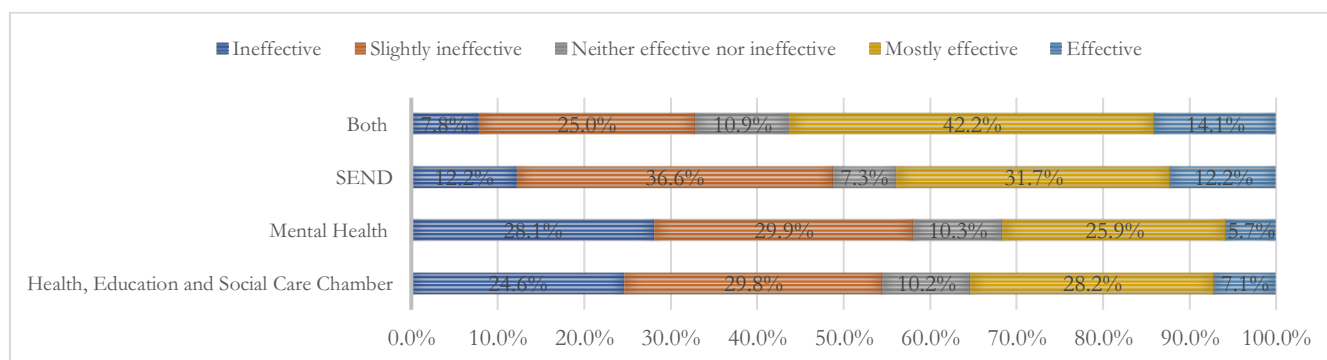


Figure 7-12: Thinking back on your overall experience of audio (telephone) hearings in the Health, Education and Social Care Chamber, would you say that telephone hearings are effective or ineffective in terms of allowing parties to participate and put their case? (n=560)

7.87 As above, the Health, Education and Social Care Chamber contained the highest proportion of respondents who indicated that telephone hearings were ineffective or slightly ineffective. A majority of respondents from this chamber (54.4%, n=560) felt that telephone hearings were ineffective or slightly ineffective, over double the proportion of respondents in the Immigration and Asylum Chamber (23.8%) which contained the second-highest proportion of respondents who felt that telephone hearings were ineffective or slightly ineffective.

7.88 In the Mental Health Tribunal, respondents indicated that the difficulties described in relation to communication undermined the quality of evidence the panel was able to elicit through telephone hearings:

“I did not always feel that I obtained the best evidence possible from a telephone hearing which affected the decision making process.” (Respondent 837, Health, Education and Social Care Chamber, Mental Health Tribunal)

7.89 The divergence of experience between respondents in the Mental Health Tribunal and SEND Tribunal was not as pronounced as in the responses to other questions. 48.8% ($n=64$) of respondents in the SEND Tribunal reported that telephone hearings were slightly ineffective or ineffective in terms of enabling parties to participate and put their case effectively, compared with 58% ($n=455$) of respondents from the Mental Health Tribunal. In explaining their replies, respondents from the SEND Tribunal indicated similar concerns to their colleagues in the Mental Health Tribunal regarding the impact of the absence of visual clues on the ability of parties to effectively make their case:

“With the difficulties of telephone hearings in terms of inconsistent communication, from a technological point of view and being unable to view witnesses when giving evidence. Parties can certainly put their case forward but it is certainly not as powerful when not in person.” (Respondent 1244, Health, Education and Social Care Chamber, SEND Tribunal)

D.6. The impact of video hearings on the ability of parties to effectively put their case

7.90 Overall, 57.6% ($n=961$) of respondents reported that video hearings were mostly effective or effective in enabling parties to participate and put their case effectively. Nearly one third of respondents across all chambers (31.9%, $n=961$) stated that in their experience video hearings were slightly ineffective or ineffective in this regard (see Figure 7.13 below). Respondents from the Tax and Chancery Chamber, which had the highest proportion of respondents who indicated that video hearings were mostly effective or effective, tended to report that this was because they had dealt mainly with professional and represented parties (see Figure 7.13 below).

7.91 As above, the Health, Education and Social Care Chamber contained the highest proportion of respondents who reported that video hearings were slightly ineffective or ineffective in enabling parties to present their case (37.2%, $n=640$). In the context of video hearings, perceptions of efficacy varied between respondents from the SEND Tribunal and those from the Mental Health Tribunal. In the SEND Tribunal, over two-thirds of respondents (70.6%, $n=82$) reported that video hearings were effective or mostly effective in terms of supporting parties to participate and put their case, compared with only half of respondents in the Mental Health Tribunal (50.4%, $n=513$, see Figure 7.14 below).

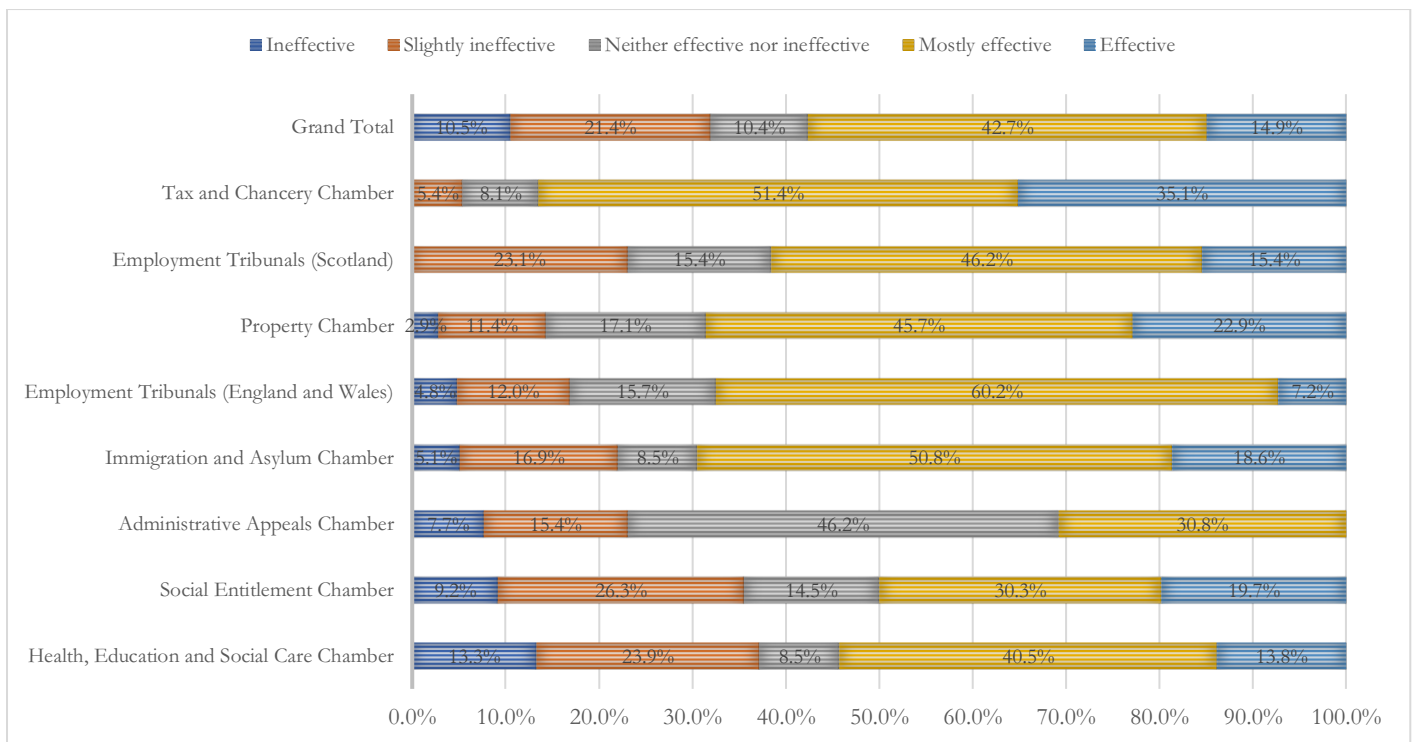


Figure 7-13: Thinking back on your overall experience of video hearings, would you say that video hearings are effective or ineffective in terms of allowing parties to participate and put their case? (n=981)

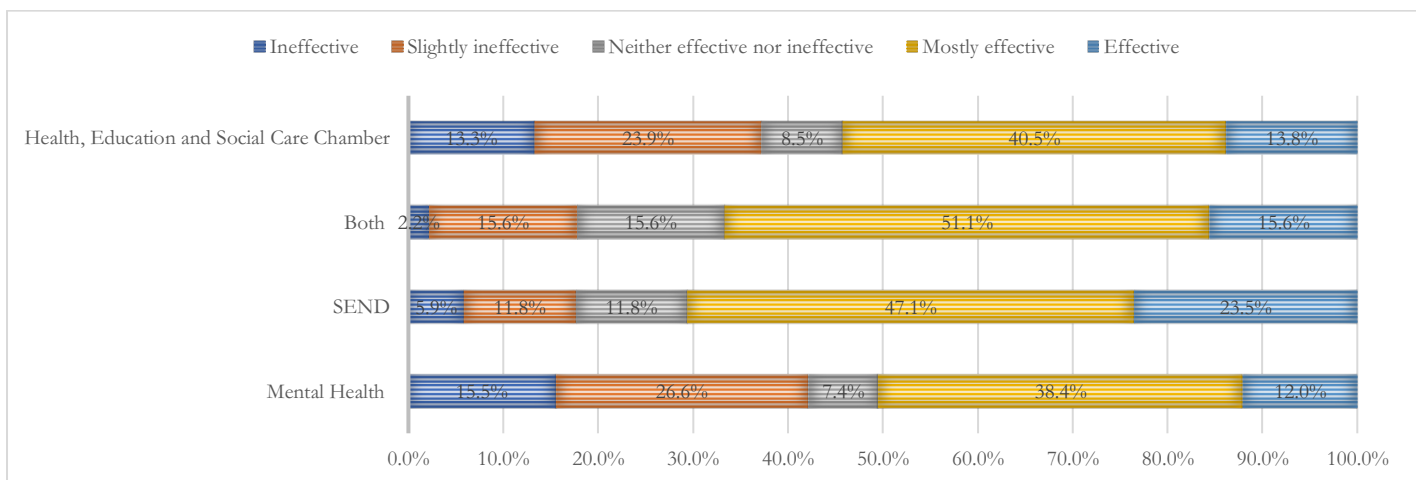


Figure 7-14: Thinking back on your overall experience of video hearings in the Health, Education and Social Care Chamber, would you say that video hearings are effective or ineffective in terms of allowing parties to participate and put their case? (n=645)

7.92 Respondents in the SEND Tribunal reported that the less-intimidating environment provided by video hearings supported parties to effectively put their case and participate in hearings. The same factors that supported communication were felt to contribute to enabling parties to participate and effectively put their case:

“When asked, all parties in SEND have said they felt able to participate and that they have preferred it to attending a tribunal centre in person.” (Respondent 236, Health, Education and Social Care Chamber, SEND Tribunal)

“For some it has been better as they can be at home, more relaxed, less issues for them getting to a venue etc. For others, it may be more difficult as they may struggle with the tech; not having rep & witnesses in same place for ease of discussions throughout the hearing etc.” (Respondent 111, Health, Education and Social Care Chamber, SEND Tribunal)

- 7.93 Many of the factors that were described as impacting negatively on communication at sections D.4.3-D.4.5 above were also referenced by respondents in explaining why they felt that video hearings were ineffective or slightly ineffective in terms of enabling parties to participate and put their case. However, within the responses provided, new and additional themes were identified. These included: (i.) the impact of video hearings on the ability of parties to communicate with their representatives during hearings; (ii.) the rigid structure imposed on video hearings to manage their tendency to overrun; (iii.) the impact on supporters’ attendance; and (iv) the informality trap—the tendency for parties to perceive video hearings as less formal and therefore not present their case as effectively.

D.6.1. The impact of video hearings on communication with representatives

- 7.94 A number of respondents raised concerns about the impact of video hearings on parties’ ability to communicate and liaise with representatives during their hearings, where parties and representatives were not joining from the same location. Respondents suggested that this physical separation between representatives and parties, and the absence of a technical solution to facilitate private communication immediately before and during the hearing, undermined the ability of parties to effectively present their case:

“The patient’s case is not given the best chance when they are not represented. They are unlikely to have seen the reports and so hear the evidence against them for the first time, this has caused significant agitation and upset. They do not have a representative who can assist them and calm them in the moment who is on their side...Patients who are suffering from paranoia or auditory hallucinations can very easily be mistrustful of the whole episode.” (Respondent 914, Health, Education and Social Care Chamber, Mental Health Tribunal)

“I think that mostly the case can be put (in many types of appeal), but there are significant pitfalls. It is, in my view, a lesser form of justice. The ability of the parties to have time before (and during) (and after) the hearing to communicate with their advocate is very severely diminished. That may in turn mean that things may get missed which would have been dealt with had the appeal been heard face to face.” (Respondent 804, Immigration and Asylum Chamber)

“There are positives in that parents are generally more relaxed in their own setting. However, it’s harder for them to communicate directly with their representatives and their witnesses. It is harder to pick up on people’s body language and it relies a lot more on the chairing capacity of the judge in order to ensure everyone is able to contribute.” (Respondent 4, Health, Education and Social Care Chamber, SEND Tribunal)

7.95 These concerns mirror the findings from existing studies of the impact of video hearings on access to justice. Research conducted by the EHRC in England and Wales³⁸ has implicated the propensity for video hearings to inhibit communication between parties and their representatives in contributing to worse outcomes for parties.

D.6.2. The impact of video hearings on the structure of hearings

7.96 A majority of respondents stated that hearings conducted by video took longer than those that proceed in person (see Chapter 8 below). In order to manage this, respondents reported that they were forced to chair hearings more assertively and impose a more rigid structure on proceedings. Some respondents felt that this rigid format reduced the ability for tribunals to deal with hearings flexibly and raised concerns that this lack of flexibility impacted negatively on the ability of parties to effectively present their case:

“The rigid structure which has to be imposed on such a hearing makes it more difficult for the more nuanced issues in the case to be ventilated. Without the structure the process would be chaotic but it does mean that there is a lack of intimacy insofar as communication with the patient and other witnesses. It is more ‘arms length’.” (Respondent 151, Health, Education and Social Care Chamber, Mental Health Tribunal)

“In SEND it has been suggested, but I have not seen any evidence myself, that some participants prefer video to a physical hearing. However, I believe that even in this jurisdiction there is a diminution in the quality of evidence - its nuance and inflection: the ability of a participant to reflect on what they have just said and amend or edit their position. This tends to be at risk of loss in the “rolling news” format of the video hearing process.” (Respondent 750, Health, Education and Social Care Chamber, Mental Health Tribunal)

“More tiring and feels less relaxed with all parties so close up to each other’s faces - introduces an intensity which inhibits the normal interplay and exchanges during a hearing.” (Respondent 1303, Employment Tribunals England and Wales)

D.6.3. The impact of video hearings on supporter attendance

7.97 A number of respondents reported that proceeding with hearings by video had impacted negatively on the number of parties who were able to attend with a supporter or friend. Some respondents raised concerns that this absence of co-present support might undermine the ability of anxious respondents to present their case effectively:

“More appellants seem to have been alone rather than with a friend or supporter.” (Respondent 846, Health, Education and Social Care Chamber, Mental Health Tribunal)

“Fewer friends and supporters.” (Respondent 487, Social Entitlement Chamber)

³⁸ Supra note 33.

“None have had mental health advocates.” (Respondent 958, Health, Education and Social Care Chamber, Mental Health Tribunal)

D.6.4. Impact of video hearings on formality

7.98 Respondents raised concerns about the impact of proceeding with hearings by video on the formality of proceedings, particularly when judges were joining from their own homes. While tribunal proceedings are intended to avoid unnecessary formality, respondents felt that the absence of gravitas could undermine parties’ perceptions of the gravity and finality of proceedings. This in turn was likely to impact on their propensity to present their case effectively. These concerns mirror findings from national and international research which has raised concerns about the impact of proceeding by video on parties’ perceptions of the importance of hearings and consequently, their approach to seeking advice and presenting their case:³⁹

“Experience suggests court users treat the CVP process as an informal one - losing sight of the formality required for an effective and fair court hearing. It is too akin to a video call with friends - even staff seem to struggle with [the] need for [an] element of formality.” (Respondent 1461, Immigration and Asylum Chamber)

“Makes the proceedings too informal- any gravitas is lost.” (Respondent 726, Health, Education and Social Care Chamber, Mental Health Tribunal)

“There is a tendency for participants to be very relaxed at home and it's important everyone understands it's as official as if we were in court. This might be helped by having a uniform background for the panel!” (Respondent 372, Health, Education and Social Care Chamber, Mental Health Tribunal)

“There is also an unfortunate tendency towards informality, I have had to stop parties eating and drinking coffee during the hearing as well as watching the news while giving evidence. I do not like being pompous but if a claimant is bringing a claim of discrimination then she wants her claim to be decided in a proper judicial process, not in something resembling a canteen.” (Respondent 926, Employment Tribunals England and Wales)

7.99 In hearings where parties were joining from community settings, a number of respondents raised concerns about parties lacking access to appropriate environments from which to participate. Distractions created by pets, children and other family members, or the absence of quiet space could all undermine the ability of parties to present their case effectively:

“I do think that there is an increased difficulty in explaining complex legal concepts to self representing parties who may not be giving you their full attention. There is only so much you can do to ensure that they are in a quiet location and uninterrupted.” (Respondent 1118, Employment Tribunals England and Wales)

³⁹ See: N. Byrom (2020) “What we Know About the Impact of Remote Hearings on Access to Justice: A Rapid Evidence Review. Briefing paper. London: Nuffield Family Justice Observatory/The Legal Education Foundation, and M. Terry et al. (2010) “Virtual Court Pilot: Outcome Evaluation” Ministry of Justice Research Series 21/10, December 2010.

D.7. The impact of remote hearings on access to a decision in accordance with law

7.100 The constitutional function of courts and tribunals is to apply the law to the facts of individual cases.

A fair and effective hearing requires both individuals presenting evidence to be able to make their case and the decision maker to be able to comprehend it. As such, any evaluation of the impact of the expansion of remote hearings on access to justice must consider the effect of changing the mode of hearing on judicial decision making. A number of respondents expressed concerns that the rapid transition to remote hearings (both telephone and video) had made arriving at a fair and accurate decision harder.

7.101 Some respondents implicated distractions created by having to manage technical difficulties in undermining the ability of the judge to focus on the evidence presented by parties. Some respondents raised concerns that this had made it more difficult to reach a fair decision:

“I worry that rather than focussing on the parties I have to pay too much attention to the technology. For example, I operated dual screens with a bundle on one, typing my notes and the CVP on the other. I am concerned that things could be missed that would be noticed in the court room.” (Respondent 1439, Employment Tribunals England and Wales)

“As I have said, there has been a muddled approach to the tech; a choice of the wrong platform in CVP (Teams is better); and too much focus on problems related to tech and to giving public access as opposed to the experience of the users and how to ensure unrepresented parties in particular are able to fully present their case in a meaningful way.” (Respondent 1163, Employment Tribunals England and Wales)

“Constant concern about whether tech issues (from IT failure or own inability) leading to this being a real distraction from the main task of being fair and just at all times.” (Respondent 931, Health, Education and Social Care Chamber, Mental Health Tribunal)

7.102 Other respondents raised concerns about the impact of their reduced ability to discern non-verbal clues or indicators on the quality of their decision making in a finely balanced case. This was felt to be particularly important in dealing with matters involving judicial assessment of credibility:

“I feel appellants are disadvantaged significantly as don't have natural access to their rep, so limits [their] input and gets in the way of justice. Some appellants very confused by the process. Communication [much] harder to pick up on important non verbal communication. Makes making a fair judgement harder.” (Respondent 63, Health, Education and Social Care Chamber, Mental Health Tribunal)

“Even on video you can miss nuances. Your eye is on 4-6 frames rather than a panorama. The demeanour of witnesses is much reduced on video and this is unhelpful for good decision making.” (Respondent 1083, Health, Education and Social Care Chamber, Mental Health Tribunal)

“Making a credibility assessment is far more difficult when removed from the parties.” (Respondent 949, Immigration and Asylum Chamber)

“It is very difficult to assess credibility over the phone.” (Respondent 1162, Immigration and Asylum Chamber)

- 7.103 A further issue raised by respondents as impacting on decision making is the impact of proceeding with hearings remotely on intra-panel discussions. Multiple respondents noted that proceeding with hearings remotely had undermined their ability to communicate privately with panel members during the course of hearings.

“It is more difficult to consult other members of the panel.” (Respondent 174, Health, Education and Social Care Chamber, Mental Health Tribunal)

“Harder to conduct panel discussions than in face to face hearings.” (Respondent 176, Social Entitlement Chamber)

D.8. Impact of remote hearings on parties’ perceptions of justice

- 7.104 The Equal Treatment Bench Book states that demonstrating procedural fairness is particularly important when parties do not get the outcome they would like or expect.⁴⁰ Successive studies have indicated that “people are more willing to accept decisions when they feel that those decisions are made through decision-making procedures they view as fair”.⁴¹ In addition, perceptions of procedural justice have been found to be linked to public trust and confidence in legal authorities and institutions, including courts and tribunals.⁴² As such, the provision of procedural justice has been positioned as intimately connected to the maintenance of the rule of law.

- 7.105 The literature on procedural justice is extensive, dating back to 1975; however, in summary, it is widely accepted that four factors are critical to the way individuals evaluate procedural fairness: “whether there are opportunities to participate (voice); whether the authorities are neutral; the degree to which people trust the motives of the authorities; and whether people are treated with dignity and respect during the process”.⁴³

- 7.106 Some respondents expressed concerns that it was more difficult to ensure that parties feel they have had a fair hearing in the context of proceeding remotely. This was attributed both to issues with the technology, which it was felt undermined perceptions of the professionalism and fairness of hearings:

⁴⁰ See Judicial College (2018) “Equal Treatment Bench Book” (March 2020 Revision) London p. 5. Available at: <https://www.judiciary.uk/wp-content/uploads/2020/05/ETBB-February-2018-amended-March-2020-17.09.20-1.pdf>.

⁴¹ T. Tyler (2000) “Social Justice: Outcome and Procedure” *International Journal of Psychology*, 2000 35 (2), 117-125, p. 117.

⁴² T. Tyler (2001) “Public Trust and Confidence in Legal Authorities: What do majority and minority group members want from the law and legal institutions?” *Behavioural Sciences and the Law*: 19, 215-235, p. 216.

⁴³ *Supra* note 35, see also: T.R. Tyler, J.D. Casper, and B. Fisher (1989) “Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the use of Fair Procedures.” *American Journal of Political Science*, 33, 629-652.

“Less easy to ensure that the patient feels [they have] had a fair hearing.” (Respondent 755, Health, Education and Social Care Chamber, Mental Health Tribunal)

“Connectivity for the parties, particularly the wards, patients and community patients has been a daily battle. I think I have had only two video hearings that have started on time and without glitches - both involved community patients who had chosen not to attend. It has been very difficult to inspire confidence in the process for the patient when we're scrabbling around to get everyone to join. Often, connections are lost during the hearing which incurs more delay.” (Respondent 841, Health, Education and Social Care Chamber, Mental Health Tribunal)

- 7.107 A number of respondents reported that being unable to see the panel had undermined both the ability of the panel to demonstrate that they were treating the appellant with dignity and fairness, and also, made it harder for parties to trust the motives of the panel:

“Claimants seem to feel disadvantaged by not being able to see the panel and their reactions. This is understandable. Being able to see the panel enables the claimant to feel they've put their case and can see the panel are human.” (Respondent 91, Social Entitlement Chamber)

“Very difficult for a Tribunal to determine a finely balanced case without being able to see any of the witnesses and the patient and some patients have expressed genuine distress and a feeling of unfairness when they have not been able to see the panel and witnesses.” (Respondent 192, Health, Education and Social Care Chamber, Mental Health Tribunal)

- 7.108 Other respondents noted that the absence of a “neutral” hearing room, and the increased ability for parties to perceive disparities between their socio-economic circumstances and those of opponents or judicial office holders, might call them to question the motives of judges and perceive the overall hearing as less fair:

“I am also slightly concerned by the wider psychological elements of a hearing. I did a difficult case for a female claimant with mental health problems. I had to deliver a judgment saying that she had lost. It seemed to me that in order to conduct the case by CVP I and all of the respondent's witnesses had effectively intruded into her living room. Then in her living room, in the presence of all her former colleagues, I explained to her why she had lost her case. I am not a psychologist but I would be interested to know what effect that has on all litigants but especially vulnerable ones. Likewise what is the impact where the respondents present their case from luxury offices and the claimant is having to present her case from a one-bedroom flat. The tribunal hearing room is a great leveller.” (Respondent 926, Employment Tribunals England and Wales)

- 7.109 A number of respondents highlighted the urgent need to capture better information on the experience of parties during remote hearings:

“Generally I think we reach the right decisions. I am concerned about the patients' views. I wonder if anyone is asking them what their experience is?” (Respondent 922, Health, Education and Social Care Chamber, Mental Health Tribunal)

“The key question is: what does the patient feel? Is it better for them? We don't run tribunals for panel members.”

(Respondent 735, Health, Education and Social Care Chamber, Mental Health Tribunal)

8 Remote hearings and judicial wellbeing

A. Overview

- 8.1 The rapid transition to remote hearings has impacted negatively on the wellbeing of the majority of judicial office holders who responded to this survey. Explanations for this included that remote hearings had changed the role of judicial office holders in hearings by: i.) making them responsible for managing technical difficulties and increasing the administrative burden placed on judges; ii.) rendering existing skills and techniques for managing hearings less useful; and iii.) making it harder to control proceedings. Remote hearings had also introduced new concerns, such as worries about interference with witnesses and parties.
- 8.2 Whilst some respondents welcomed the reductions in travel time, and the fact that proceeding with hearings remotely had enabled fee-paid judges to continue earning during the pandemic, many reported missing the social aspect of engagement with fellow panel members. Concerns were also raised about the potential for arrangements surrounding remote hearings to foster resentment between fee-paid and salaried judges.
- 8.3 A majority of respondents reported that remote hearings were more tiring than hearings conducted in person. This was attributed to: i.) the propensity for remote hearings to increase the length of hearings; ii.) the increased levels of concentration required; and iii.) the stress associated with managing the technology alongside managing the hearings. These findings are explored further below.

B. The impact of remote hearings on judicial office holders' satisfaction with their role

- 8.4 77.8% of respondents stated that telephone hearings were worse for judicial office holders than in person hearings ($n=1334$) and 73.9% ($n=975$) respondents reported that video hearings were worse for judicial office holders than hearings convened in physical settings (see Figures 8.1-8.4 below).
- 8.5 The Tax and Chancery Chamber contained the lowest proportion of respondents who indicated that telephone hearings were worse for judges (45%, $n=20$) this was attributed to the nature of the work conducted in this chamber. The Health, Education and Social Care Chamber contained the highest proportion of respondents who described telephone hearings as worse (86.1%, $n=561$). This was attributed to high rates of technical failure experienced in this chamber (particularly in the Mental Health Tribunal) and the impact of telephone hearings on the quality of communication in hearings. The SEND Tribunal contained the highest proportion of respondents who described telephone hearings as better for the judge (13.5%, $n=67$).

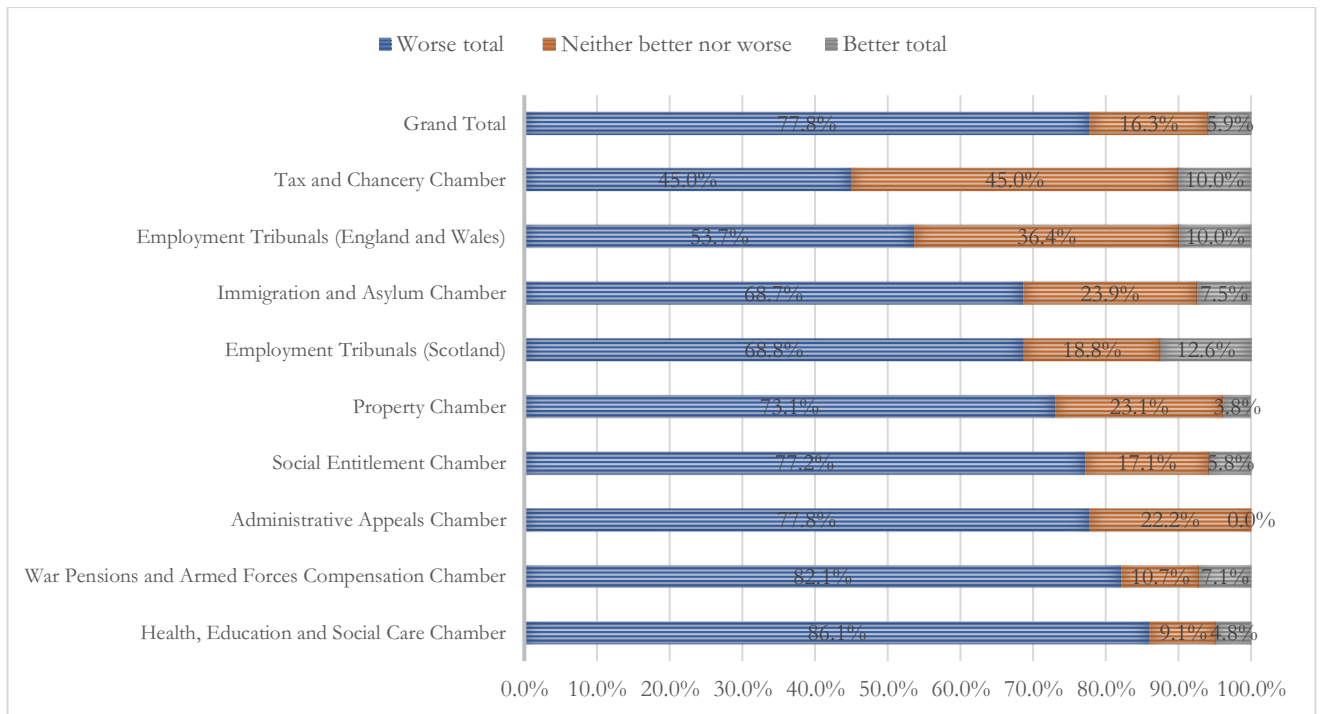


Figure 8-1: Based on your overall experience of audio (telephone) hearings, would you say that telephone hearings are worse or better than physical hearings for the judge? (n=1334)

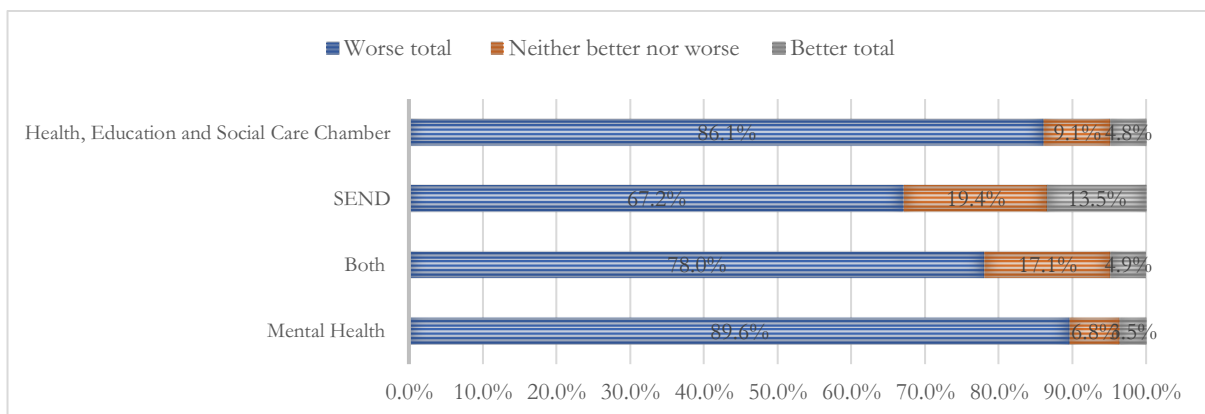


Figure 8-2: Based on your overall experience of (audio) telephone hearings in the Health, Education and Social Care Chamber, would you say that they are worse or better than physical hearings for the judge? (n=561)

8.6 As above, the Tax and Chancery Chamber contained the lowest proportion of respondents who described video hearing as worse for the judge (45%, $n=37$). This is attributed both to the nature of the work conducted in this chamber and satisfaction with the technology provided. Employment Tribunals (Scotland) contained the highest proportion of respondents who felt that video hearings were worse for the judge, although the absolute number of respondents from this chamber was low ($n=13$). Employment Tribunals (England and Wales) contained the third-highest proportion of respondents who considered that video hearings were worse for the judge (78.8%, $n=85$), only slightly less than the Mental Health Tribunal (79.1%, $n=513$) where systemic issues with technology were experienced. This is concerning considering the reliance of the recovery plan for this tribunal on video hearings.

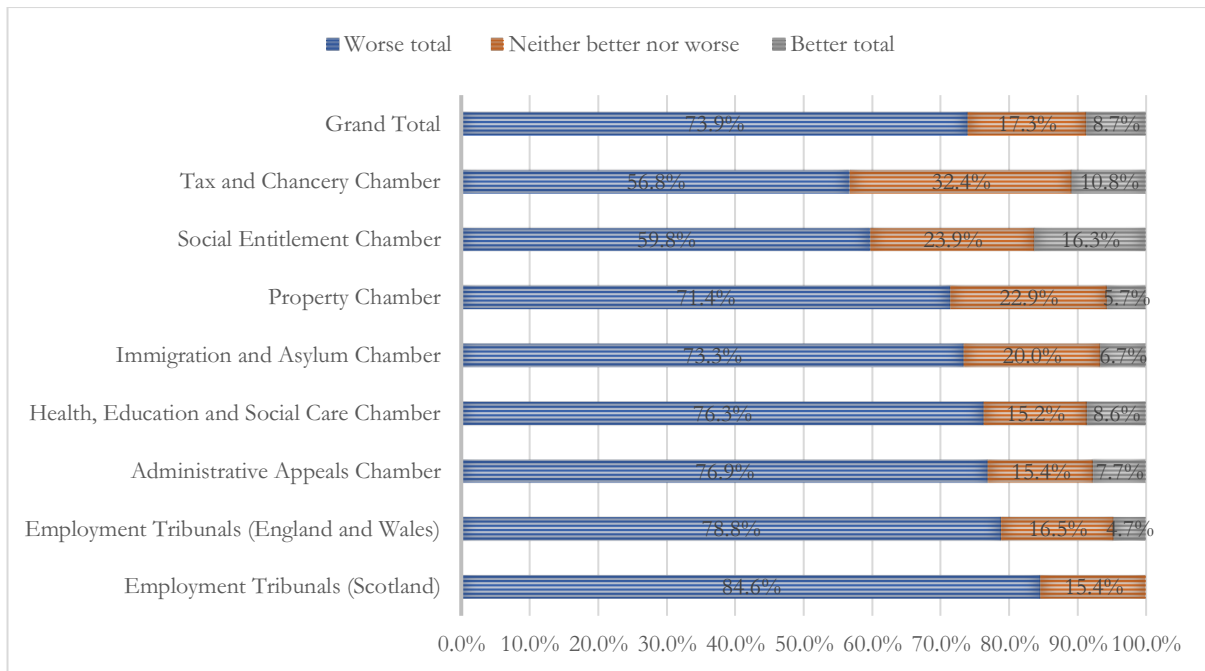


Figure 8-3: Based on your overall experience of video hearings, would you say that video hearings are worse or better than physical hearings for the judge? (n=975)

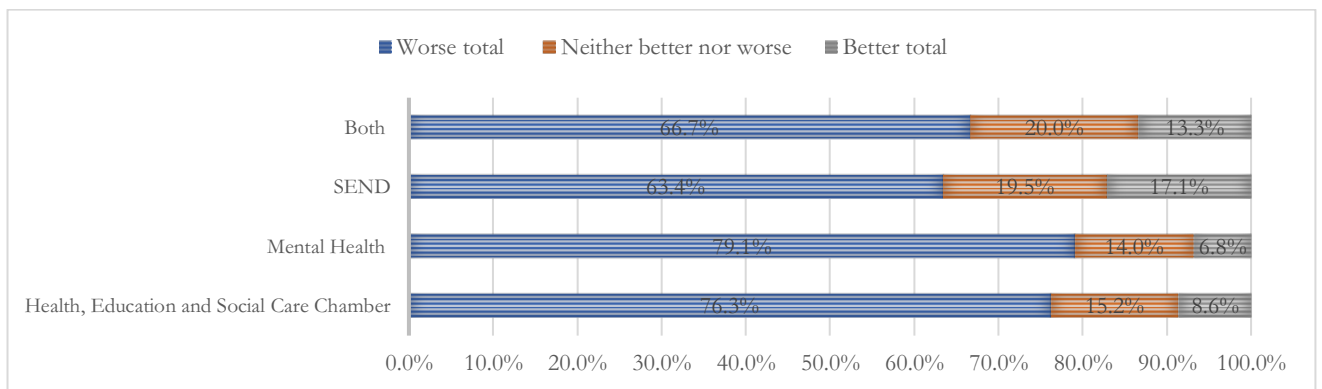


Figure 8-4: Based on your overall experience of video hearings in the Health, Education and Social Care Chamber, would you say that video hearings are worse or better than physical hearings for the judge? (n=975)

8.7 Respondents from the Employment Tribunals (England and Wales) implicated: i.) technical difficulties; ii.) issues with communication during hearings; iii.) the increased preparation burden required to enable hearings to run effectively; iv.) issues with accessing and navigating documents; and v.) issues controlling the courtroom in their explanation for why video hearings were worse than in-person hearings for judges:

“They require even more vigilance from the judge than normal and when the technology does not work or a connection drops, it can be very stressful for the judge, who is responsible for ensuring that the hearing is both effective and lawful.” (Respondent 778, Employment Tribunals England and Wales)

“It’s harder generally because there is another layer of things to think about other than running the hearing, considering the papers and the arguments and making a decision.” (Respondent 1222, Employment Tribunals England and Wales)

- 8.8 The SEND Tribunal contained the highest proportion of respondents who expressed the view that video hearings were better for the judge (17.1%, $n=82$). Explanations for this included that proceeding by video had enabled more hearings to take place as it was easier to convene panels and that working in this way had reduced travel time and improved the participation for some parents.
- 8.9 In reviewing the explanations for why a majority of respondents overall reported remote hearings (both telephone and video) to be worse for the judge, a number of common themes emerged. These are discussed below at sections B.1-B.5.

B.1. Remote hearings increase the burden on judges

- 8.10 A majority of respondents reported that remote hearings (both telephone and video) increased the burden on judges. This was partly attributable to reductions in the administrative support available which had resulted in judicial office holders being made increasingly responsible for contacting parties and “joining” them to hearings. Respondents also felt responsible when technical issues were experienced: the high level of technical issues reported had led to judicial office holders adopting a constant posture of vigilance, which increased their cognitive burden during hearings:

“I’m not as relaxed about remote hearing and have quiet panics when equipment has glitches or doesn’t immediately work. I’m more reluctant to take on longer hearings. I also worry when we are in camera unless there is another person able to listen in. However I feel I have adapted reasonably well and am proud that the legal system has been able to keep going throughout this pandemic.” (Respondent 833, Health, Education and Social Care Chamber, SEND Tribunal)

“I am grateful that I have been able to work and for my Tribunal’s proactive and quick response to hearing cases remotely which has meant, from a personal perspective, that I have been able to carry on working despite having a vulnerable adult and small children at home. All of the Tribunal staff have really done their best to help - but without proper technical support there is a limit to what they can do.” (Respondent 170, Health, Education and Social Care Chamber, Mental Health Tribunal)

- 8.11 These issues were magnified when hearings were more complex, involved litigants in person or where parties required the assistance of an interpreter:

“No doubt about it at all - in person hearings are much easier, especially with unrepresented parties. and that’s even if the technology works.” (Respondent 1503, Employment Tribunals Scotland)

“It depends on the party. Some struggle, particularly those with disabilities or are not computer literate.”
(Respondent 1378, Employment Tribunals England and Wales)

“Not having to drive for over an hour each way makes them less tiring, but the hearing itself is less relaxed - you have to concentrate harder to ‘be in the room’ with the hearing, when you’re not questioning, and when you are questioning you have to be much more alert to how you are doing it to accommodate to the need to space out conversation. I have had one hearing with an interpreter - the interpreter was great, but again - the flow of

conversation was much more interrupted, it took twice as long, and it was another aspect to have to concentrate on.”

(Respondent 749, Health, Education and Social Care Chamber, Mental Health Tribunal)

B.2. Remote hearings require judges to adapt their skillset

8.12 A majority of respondents who reported that remote hearings were worse for judges referenced their impact on the ability to communicate effectively with parties and the difficulties entailed in establishing rapport and assessing credibility through hearings that do not proceed in person. Respondents felt that the normal skills relied on by judges to conduct fair hearings were less effective in the context of remote hearings, and were unclear as to how this could be remedied. A number of respondents reported that the types of hearings suitable for remote conduct, and the skills necessary to conduct them effectively should be reviewed in the aftermath of the pandemic:

“Talking to and seeing people on a screen is not the same as dealing with them face-to-face and where factual matters are in dispute or there are issues of credibility to determine, a remote hearing is not an appropriate way of dealing with those cases. All of the tools judges have developed for dealing with people, listening to their evidence, the nuances of what is said and how it is said, are lost remotely.” (Respondent 1496, Employment Tribunals England and Wales)

“I think that SENDIST has managed the transition very well and risen to the challenge admirably. We have been well supported. The hearings are a compromise, but certainly a perfectly adequate system of justice for the less evidential hearings (i.e. when decisions arise from an exchange of ideas rather than from forensic analysis of evidence). I have conducted remote hearings as an Assistant Coroner as well, and am of the view it is well suited to a more inquisitorial type of hearing, given the expanded role for a Judge in conducting a video hearing; you have to be more interventionist.” (Respondent 875, Health, Education and Social Care Chamber, SEND Tribunal)

B.3. The impact of remote hearings on the ability to control proceedings

8.13 Many respondents reported that remote hearings were worse for judges because, in the absence of the formality provided by a physical courtroom or hearing centre, it was harder to control proceedings. Reductions in the availability of visual cues made it more difficult to understand when parties wished to interject, or observe when parties were becoming distressed or agitated. Respondents reported that it was harder to manage interruptions or shape parties’ interactions with the tribunal without being perceived as negative (see Chapter 7 above):

“Although hospital tribunals are reasonably informal, there is a formality in the layout of the room and the seating arrangements which affords a certain gravitas to the proceedings, and the judge’s authority is made clear by those things. Without them, I think the judge has a more difficult task in managing the space as well as recording the proceedings. Also, it is impossible to register the non-verbal cues, which are often a prelude to more obvious displays of distress or aggression, so it is then impossible to intervene and de-escalate a developing situation in its early stages.” (Respondent 110, Health, Education and Social Care Chamber, Mental Health Tribunal)

“Harder to navigate and control the hearing.” (Respondent 1429, Employment Tribunals England and Wales)

- 8.14 In addition, a number of respondents expressed concerns about their ability to preserve the privacy and integrity of the hearing. Judges reported concerns about their ability to identify when parties or witnesses were being coached during the course of the hearing:

“Advantages: hearing always starts on time; no delays due to parties travelling, getting lost etc; vulnerable witnesses find it easier to access hearing (e.g. breastfeeding mother could continue to breastfeed and participate by muting and turning video off); it is easier to control the flow of new documents produced on the day of the hearing. Disadvantages: the hearing lacks the same gravitas of a hearing in the court, it is impossible to be certain that a witnesses' evidence is not influenced by an unseen note, prompt or person, it can be tiring; there are more requests for written reasons if the parties' audio is poor; the hearings are slower because of the need to repeat or pause if a party's audio or video drops out.” (Respondent 1179, Employment Tribunals England and Wales)

“As a judge I felt that the experience was better because appellants were less guarded. However, what I found difficult was whether witnesses were being ‘coached’ as at times I could hear whispering but not clearly enough to challenge.” (Respondent 254, Property Chamber)

B.4. Impact on relationships with panel members

- 8.15 Respondents who felt that remote hearings were worse for judicial office holders implicated the impact of deciding cases via this medium on their ability to communicate with and rely on other panel members. These concerns were exacerbated in the context of the Mental Health Tribunal, where respondents reported that the consequences of reaching the wrong decision were serious:

“Mainly because of the additional layer of concerns of technical connection etc as well as conducting the hearing. Also because it is more difficult to consult other members of the tribunal panel.” (Respondent 450, Health, Education and Social Care Chamber, Mental Health Tribunal)

“You cannot rely on colleagues in the same way, you have less visual contact so managing the witnesses and processes is harder.” (Respondent 956, Health, Education and Social Care Chamber, Mental Health Tribunal)

“There are many negatives - not being able to see the patient and others at the hearing, not being able to see my panel colleagues (when we were still sitting as a panel), exhaustion from the higher levels of concentration on audio only as there are no physical cues to observe.” (Respondent 1196, Health, Education and Social Care Chamber, Mental Health Tribunal)

B.5. Job satisfaction and wellbeing

- 8.16 Whilst fee-paid judges were grateful that hearings had been able to take place (as this enabled them to earn an income through the pandemic), respondents reported that proceeding with hearings remotely had undermined wellbeing and job satisfaction for judicial office holders. A number of respondents reported that proceeding with hearings remotely had removed the benefits judicial

office holders gain from the social nature of their role, many reported feeling isolated as a consequence:

“Only down side has been that this way of working is very insular. The opportunities to get to know colleagues and chat over lunch - networking and ‘social’ aspects of it have gone. This is a disappointment and makes the working less enjoyable.” (Respondent 1111, Health, Education and Social Care Chamber, SEND Tribunal)

- 8.17 Other respondents reported that the transition to remote hearings had precipitated a significant increase in workload without a commensurate increase in the support provided to judicial office holders. Working conditions for many who were forced to work from home (in the absence of proper equipment and furniture) were reported to be inadequate. The increased administrative burdens placed on judicial office holders during this period were reported to undermine job satisfaction and fundamentally alter the nature of the role:

“Everyone involved in SENDIST hearings is pleased that it has been possible to continue with remote hearings during the pandemic. For Judicial Office Holders this is because we are fee paid for work done and no hearings would have meant no income. For the parties to the hearings it is a great relief for them that their case is being heard at all as over 1000 were postponed last year before the pandemic at great inconvenience to all concerned. The leadership team in SENDIST have taken advantage of this situation expecting us to endure worse working conditions, while demonstrating no understanding of the additional work load.” (Respondent 1193, Health, Education and Social Care Chamber, SEND Tribunal)

“I sit in a room all day on my own with earphones in, writing for about 6 hours. I cannot have the door or window open for confidentiality reasons. I act as a telephonist and then as a glorified stenographer. My ability to manage the hearing, ensure it is fair and assess the evidence is significantly impaired. It is very stressful not knowing what is in the Tribunal file to check I have covered/found everything. I have fewer opportunities for proper breaks. If this is being a judge then it is very unappealing as a job. This also is second rate justice for the parties.” (Respondent 609, Social Entitlement Chamber)

- 8.18 A number of respondents expressed disquiet at the perceived disparity between resources available to salaried judges and those provided for their fee-paid counterparts. Respondents noted the potential for the differential treatment emphasised by expansion of remote hearings to generate resentment between different categories of judicial office holder:

“As a fee paid Judge I was pleased to be asked by my region (London Central) to participate in remote hearings, and have found [it] to be a valuable learning curve. However, all the support and training came from Judicial colleagues (who have been marvellous) and no support at all was provided by HMCTS or MoJ. We (FPJs) have had to provide all our own equipment and pay for all our additional expenses (headsets/second screen/printing/extra paper/ink cartridges etc). Further the Employment Tribunal President is currently trying to have us supplied with PDF software to enable documents to be properly accessed during full hearings. This is currently only available to salaried colleagues. If the way forward for the Court system is via remote hearings, and fee paid Judges are expected to be part of that, then

HMCTS and MoJ need to reassess how we are supported to enable us to participate fully and to provide a professional and fair service to the parties.” (Respondent 1448, Employment Tribunals England and Wales)

“COVID has laid bare the gulf between salaried and fee paid staff in terms of pay and provision of IT support. HMCTS relies too heavily [on] the goodwill of the fee-paid, in stark contrast to OGDs such as the MoD.” (Respondent 1350, War Pensions and Armed Forces Compensation Chamber)

8.19 Some respondents noted the propensity for working in this way to increase the vicarious trauma experienced by judicial office holders dealing with distressed and anxious parties:

“I wear [earphones] and feel as if the appellants’ words and sometimes distress affect me more. They ‘lodge in my ear’ even [when] the case is over.” (Respondent 223, Social Entitlement Chamber)

8.20 Others reported that concerns about not being able to perform their role to a satisfactory standard when proceeding remotely drove feelings of anxiety and undermined job satisfaction. One respondent summarised this in the following terms: *“It feels like doing a job with one hand tied behind your back” (Respondent 958, Health, Education and Social Care Chamber, SEND Tribunal).*

C. Remote hearings and tiredness

8.21 Overall, the majority of respondents reported that remote hearings were more tiring than hearings in person: 71.8% of respondents reported that telephone hearings were more tiring than hearings in person. An even higher proportion of respondents (81.0%, n=966) stated that video hearings were more tiring than hearings in person (see Figures 8.5-8.8 below). As such, the impact of continuing to work in this way on judicial wellbeing should be monitored.

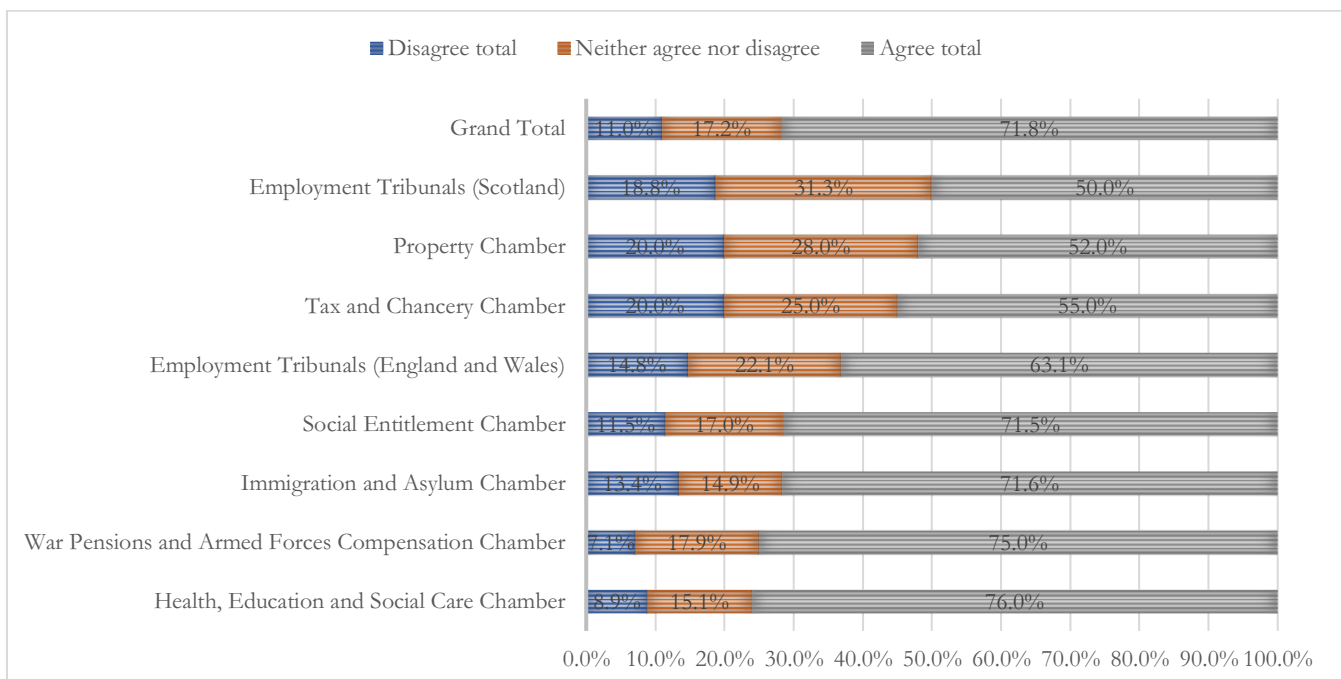


Figure 8-5: Comparing your experience of audio (telephone) hearings to physical hearings, to what extent would you agree with the statement: “telephone hearings are more tiring than physical hearings”? (n=1343)

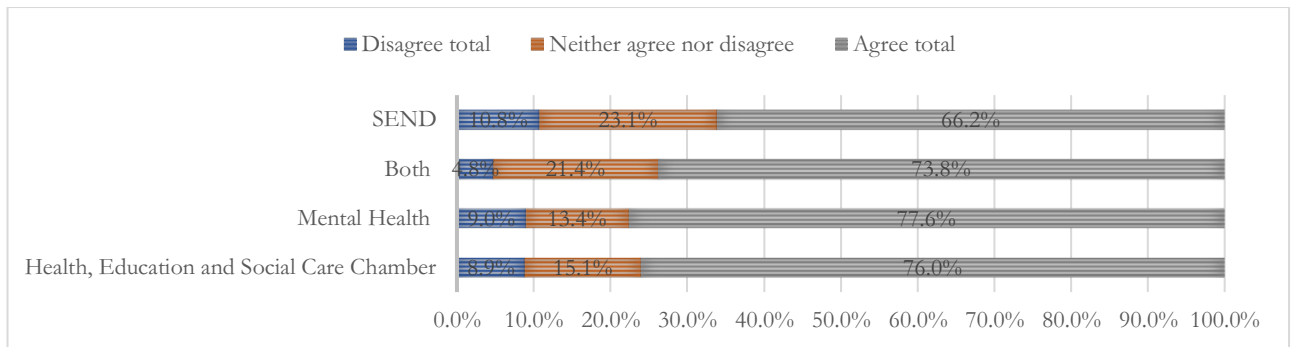


Figure 8-6: Comparing your experience of audio (telephone) hearings to physical hearings in the Health, Education and Social Care Chamber, to what extent would you agree with the statement: “telephone hearings are more tiring than physical hearings”? (n=665)

C.1. Tiredness and audio hearings

8.22 Whilst some respondents highlighted the practical benefits of audio (telephone) hearings in terms of eliminating the need for travel and reducing the stress involved in securing parking, most felt that these were outweighed by the additional tasks involved in managing audio hearings, the propensity for audio hearings to take longer than hearings in person, and the need for increased concentration involved:

“Telephone hearings seem to be longer and, require very focused concentration to hear what is being said (sometimes muffled sound/ interference on line). The first day I did telephone hearings I was on the phone for 6 hours with a 15 minute break.” (Respondent 91, Social Entitlement Chamber)

“The practical difficulties contribute to increased tiredness. The lack of IT and administrative support is another contribution. The lack of consistency between how legal members conduct the hearings is also tiring. The difficulties some judges have in getting the participants to join into the hearing.” (Respondent 28, War Pensions and Armed Forces Compensation Chamber)

C.2. Tiredness and video hearings

8.23 As above in the case of audio hearings, respondents reported that the practical benefits of not having to travel to hearings were insufficient to compensate for the stress of dealing with technical issues and managing additional tasks:

“They are exhausting. They add a whole new layer of stress because the technology has to be managed as well as the hearing. You cannot read body language or assess how the patient is coping from a one inch image on a screen. Questions and evidence needs to be repeated because one or more participants in the call cannot hear. The hearing takes much longer than usual which is wearing for everyone. The level of concentration on the audio and screen causes headaches. Not one hearing started on time due to problems with connectivity for at least one participant at the start.” (Respondent 748, Health, Education and Social Care Chamber, Mental Health Tribunal)

“I find them a lot more stressful. I have to do all the usual things: explain to parties what is happening, keep the hearing moving, keep it relevant, check the legal issues, keep a record, take notes.....and then the technology requires different ways of making sure the parties are involved, can raise points when they want to (no body language to help);

For example, I tell parties at the start I have to keep a record, so they can see when I am busy writing, and will pause without being told. In a video hearing, I have to tell them to wait. I have to check round individually to see if everyone has had their say on a point; I can't just glance round the courtroom. These are small points, but the cumulative effect over a day is exhausting. I used to draft my judgments at the close of a hearing: not after a video hearing!" (Respondent 753, Health, Education and Social Care Chamber, Mental Health Tribunal)

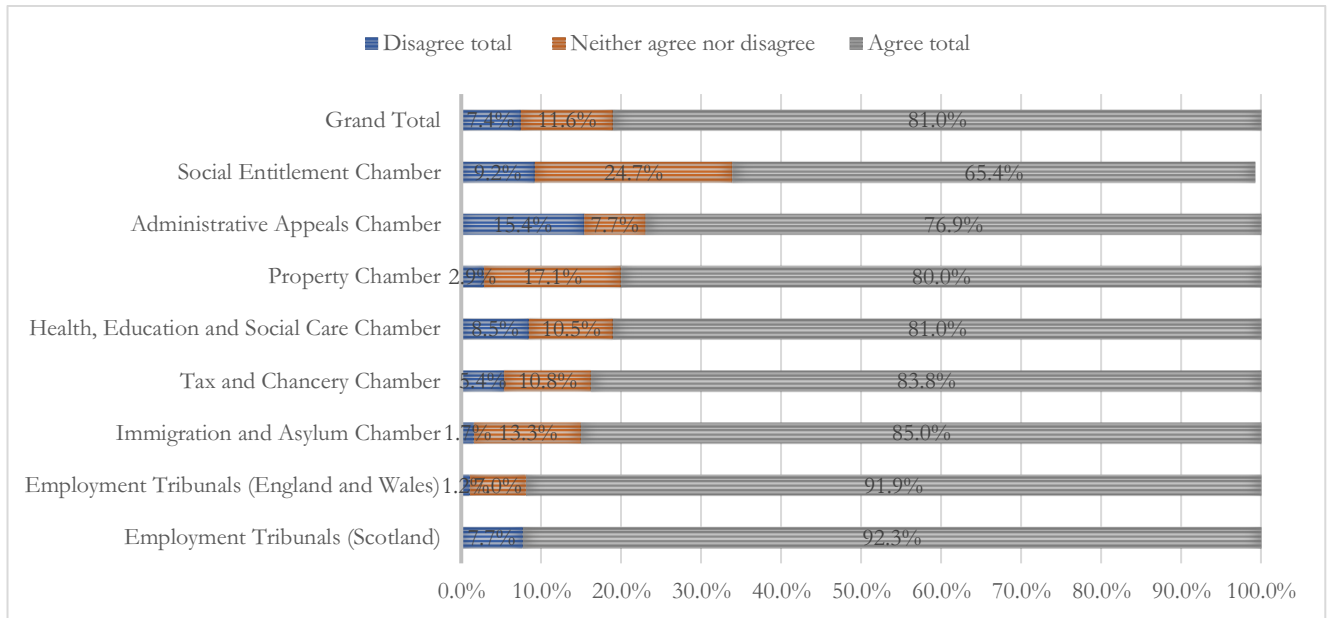


Figure 8-7: Comparing your experience of video hearings to physical hearings, to what extent would you agree with the statement: "video hearings are more tiring than physical hearings"? (n=966)

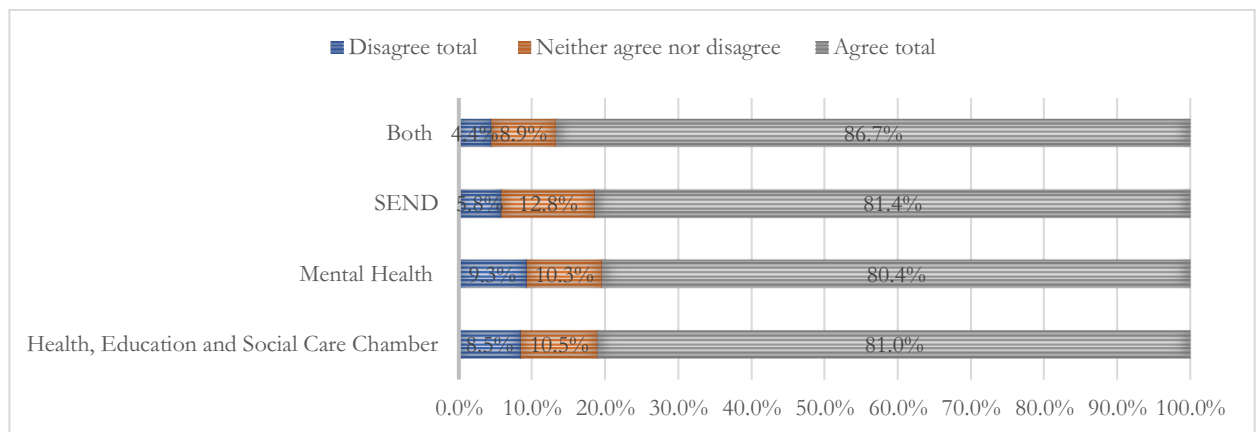


Figure 8-8: Comparing your experience of video hearings to physical hearings in the Health, Education and Social Care Chamber, to what extent would you agree with the statement: "video hearings are more tiring than physical hearings"? (n=647)

8.24 These issues were exacerbated for judicial office holders with hearing impairments, who were unable to rely on lip reading and non-verbal cues to the same extent.

C.3. Hybrid hearings and tiredness

8.25 A number of respondents reported that hybrid hearings, where participants join by multiple methods were particularly tiring, as these hearings magnify the issues in each medium. Hybrid hearings have been proposed as a crucial component of recovery- the impact of proceeding in this fashion on judicial wellbeing must be monitored:

“It is very intense and concentration can lapse if there are not frequent breaks. It’s even more difficult if there are a mixture of participants joining by phone as well as video as is the case when the connections are poor.”

(Respondent 4, Health, Education and Social Care Chamber, SEND Tribunal)

“CVP is a useful tool in the crisis to keep cases progressing but should not substitute in person hearings long term. Its increased use in hybrid hearings makes sense if there are particular reasons why a witness cannot attend or a vulnerability makes remote attendance preferable. CVP hearings require skilled clerks who can troubleshoot technical problems - it shifts the role from that of usher to clerk. Hybrid hearings (part remote, part in person) are particularly taxing and require the right A/V equipment in hearing rooms (not available in many hearing rooms used by the Employment Tribunal) and trained clerks who can operate the camera.” (Respondent 1476,

Employment Tribunals England and Wales)

9 Bibliography

A. Cases

Bremer v South India Shipping Corporation Ltd (1981) AC 909, 917.

R (Detention Action) v First Tier Tribunal (Immigration and Asylum Chamber) [27].

R (Gudanaviciene & Ors) v Director of Legal Aid Casework & Lord Chancellor [2014] EWCA Civ 1622; [2015] 1 W.L.R. 2247 [46].

R (Howard League for Penal Reform and The Prisoner's Advice Service) v Lord Chancellor [2017] EWCA Civ 244 [51])

B. Primary Legislation

Tribunals Courts and Enforcement Act 2007 c15.

C. Secondary Legislation

The Tribunal Procedure (Upper Tribunal) Rules 2008 UKSI 2008 No.2698 (L.15)

The Tribunal Procedure (Coronavirus) (Amendment) Rules 2020.

D. Practice Directions

Senior President of Tribunals (19 March 2020) "Pilot Practice Direction: Contingency Arrangements in the First-Tier Tribunal and the Upper Tribunal."

Senior President of Tribunals (14 September 2020) "Amended General Pilot Practice Direction: Contingency Arrangements in the First-Tier Tribunal and the Upper Tribunal."

E. Blogs

B. Campbell (2020) "A period of adjustment - how employment tribunals are responding to COVID-19 and how we can be best placed to help them" *Brodies LLP*. June 2020.

<https://brodies.com/insights/employment-and-immigration/employment-tribunal-hearings-during-the-covid-19-pandemic/>

E. Fitzsimons (2020) "COVID-19: Implications for Statutory appeals in the First-Tier and Upper Tribunal (Immigration and Asylum Chamber)" *Garden Court Chambers Blog*, Thursday 11 June 2020.

Available at: <https://www.gardencourtchambers.co.uk/coronavirus-legal-news-views/covid-19-implications-for-statutory-appeals-in-the-first-tier-and-upper-tribunal-immigration-and-asylum-chamber>

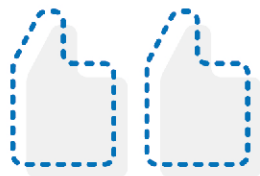
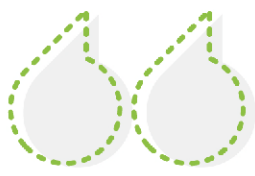
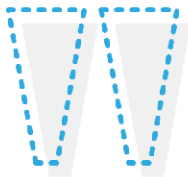
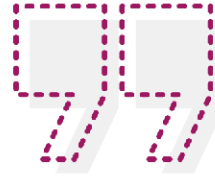
Disability Rights UK "Video hearings to be made available for Social Security and Child Support Tribunals" June 2020. <https://www.disabilityrightsuk.org/news/2020/june/video-hearings-be-made-available-social-security-and-child-support-tribunals>.

F. Publications

- A. Bogg (2018) “The Common Law Constitution at Work: *R (on the application of UNISON) v Lord Chancellor*” *Modern Law Review* 81 (3) MLR 509-538.
- N. Byrom (2019a) “Developing the Detail: Evaluating the Impact of Court Reform in England and Wales”
- N. Byrom, (2019b) “Digital Justice: HMCTS Data Strategy and Delivering Access to Justice: Report and Recommendations”.
- N. Byrom (2020) “What we Know About the Impact of Remote Hearings on Access to Justice: A Rapid Evidence Review. Briefing paper. London: Nuffield Family Justice Observatory/The Legal Education Foundation
- P. Cooper and J. Jacobson (2020) *Participation in Courts and Tribunals: Concepts, Realities and Aspirations* 30 September 2020, Bristol University Press: ISBN 978-1529211290.
- EHRC (2018) “Response of the Equality and Human Rights Commission to the Consultation: Proposal to amend the Tribunal Procedure (First-Tier Tribunal)(Health, Education and Social Care Chamber) Rules 2008 in relation to pre-hearing examinations, and decisions without a hearing in the case of references by the hospital or Department of Health” (June 2018)
- EHRC (2020) “Inclusive justice: a system designed for all- Interim evidence report, Video hearings and their impact on effective participation.”
- E. Fitzsimons (2020) “COVID-19: Implications for Statutory appeals in the First-Tier and Upper Tribunal (Immigration and Asylum Chamber)” *Garden Court Chambers Blog*, Thursday 11 June 2020.
- Judicial College (2018) “Equal Treatment Bench Book” (March 2020 Revision) London
- G. McKeever (2013) “A Ladder of Legal Participation for Tribunal Users”, *Public Law*, July 2013.
- G. McKeever (2020) “Remote Justice? Litigants in Person and Participation in Court Processes During COVID-19” MLRForum 005.
- Sir Ernest Ryder (2020) “The Senior President of Tribunals Annual Report 2020”
- M. Terry et al. (2010) “Virtual Court Pilot: Outcome Evaluation” Ministry of Justice Research Series 21/10, December 2010.
- R. Thomas (2016) “Current Developments in UK Tribunals- Challenges for Administrative Justice” p. 4.
- T.R. Tyler, J.D. Casper, and B. Fisher (1989) “Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the use of Fair Procedures

T. Tyler (2000) "Social Justice: Outcome and Procedure" *International Journal of Psychology*. 2000 35 (2), 117-125, p. 117.

T. Tyler (2001) "Public Trust and Confidence in Legal Authorities: What do majority and minority group members want from the law and legal institutions?" *Behavioural Sciences and the Law*: 19, 215-235, p. 216.



The Legal Education Foundation

Registered office

Suite 2, Ground floor
River House
Shalford, Guildford
Surrey GU4 8EP

www.thelegaleducationfoundation.org

Registered charity no. 271297
Registered in England and Wales



TRIBUNALS
JUDICIARY

The
Legal
Education
Foundation