

The Pandemic and Family Justice: Unequal Outcomes and Access to Justice

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Acknowledgements



Today's agenda

- Project overview
- Methodology
- Preliminary findings
 - High conflict separations
 - Family violence
 - Self-representation
 - Technology concerns
- Tentative conclusions

Project Overview

Claire Houston

The pandemic and family justice

- March 2020: physical closure of courthouses, remote “urgent” hearings, family professionals “pivot”
- Pre-existing access to justice concerns: cost, complexity, delay
- Research questions:
 - How has the pandemic impacted the family justice system?
 - How have these impacts been felt by different groups?
 - What can we learn that may improve the justice process?

Methodology

Rachel Birnbaum



Research
Mixed Methods Approach Informs
One Another

Quantitative Data
(survey data, caselaw)



Qualitative Data
(interviews with self-
reps, mental health
professionals, lawyers,
and judges)

Mixed-methods approach

1. Analysis of reported Ontario family law decisions
 - a) “Lockdown” period: March-July 2020
 - b) “Reopening” period: July 2020-March 2021
2. Surveys of professionals
3. Interviews with professionals and SRLs

Survey of professionals

- n = 91
- Lawyers (54%), MH professionals (21%), other (20%) (e.g. supervised access worker), judges (4%)
- 43% = 21 or more years in family justice
- 77% identify as female

“Lockdown” cases

- All reported Ontario family law decisions heard between March 17, 2020 – July 6, 2020
- $n = 506$
- $N = 32$ child protection, $n = 474$ domestic

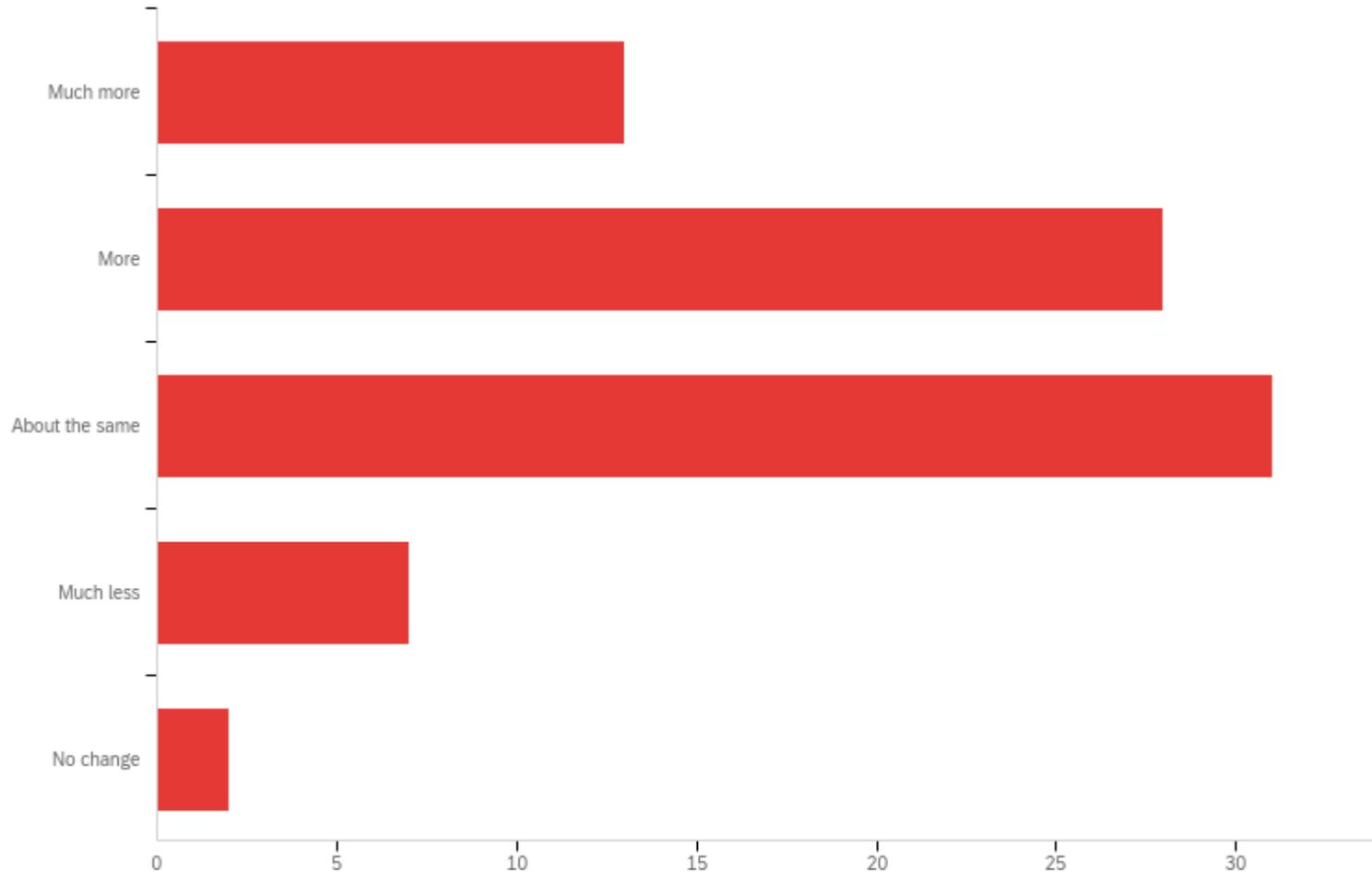
Preliminary Findings: High Conflict

Nicholas Bala

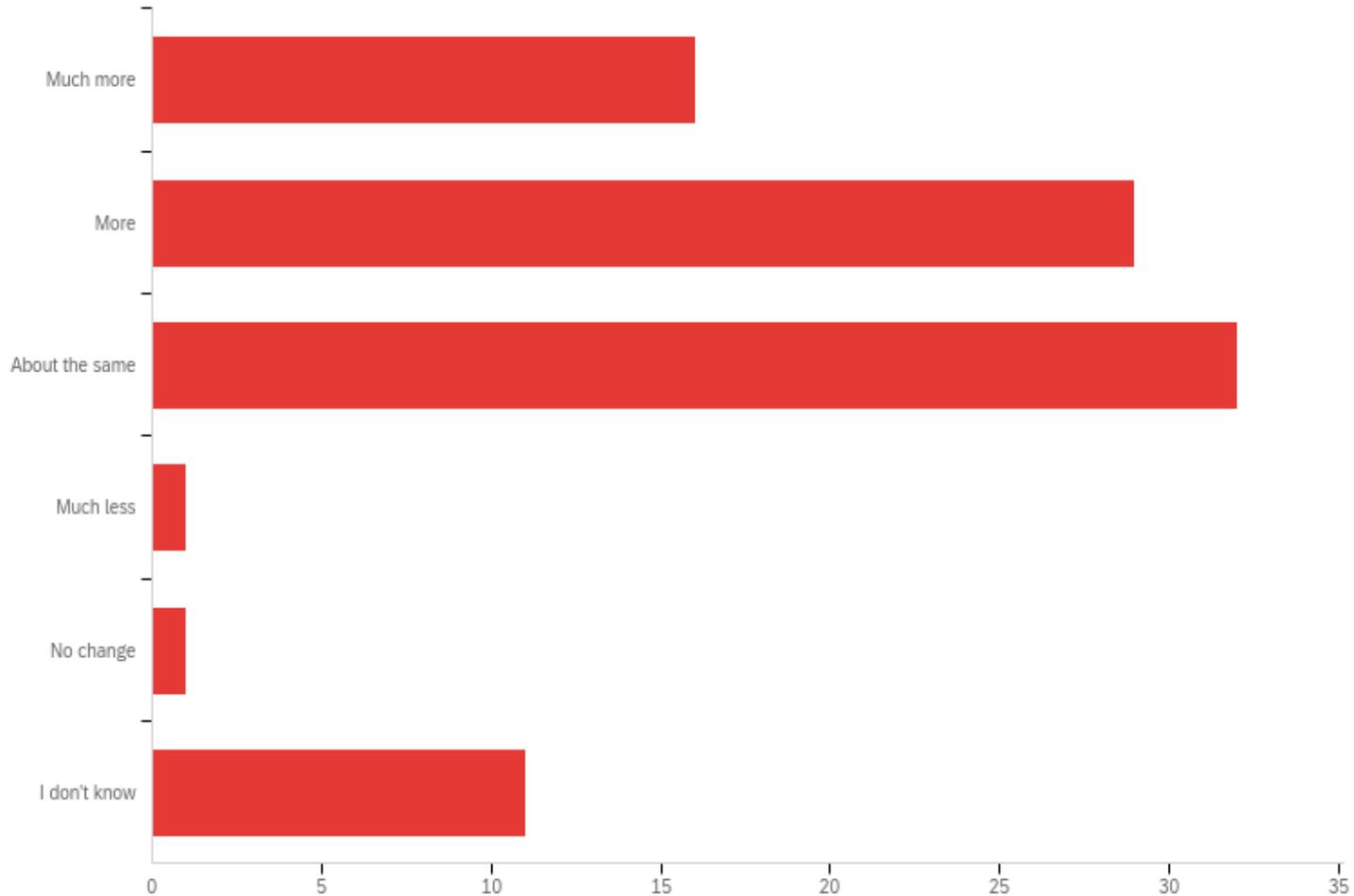
Impact of the pandemic on “high conflict” families

- More “high conflict” families, and more conflict within HC families
- Access difficulties and “taking advantage” of the pandemic
- Concern about impact of limited access to court, especially on children

High conflict in “lockdown”: survey



HC in “re-opening”: survey



Significant HC in “lockdown” cases

- Judges use “HC” or similar language in 40% of cases
- More stress → more conflict: “*This case has a long and acrimonious litigation history, which is exacerbated by these very concerning times amid the COVID-19 crisis*” (*Hermanus v Laurin*, 2020 ONCJ 190)
- Most cases involved previous appearances (~ 75%)
- *Smith v Smith*, 2020 ONCJ 180: second urgent motion brought in “high conflict” case

More conflict in HC families: survey

- Existing conflict exacerbated and more sources of conflict
- *“The pandemic has thrown gasoline on high conflict families.”*
- *“I think high conflict families have seen more conflict. Rules and restrictions about Covid and exposure or potential risks has become one more thing to fight about”.*
- Impact on children: *“Children witnessing more conflict as not in school.”*

Access issues: cases and survey

- Majority (56%) of parenting cases involve access difficulties
- Allegations of other parent not following health guidelines
- Concern about “taking advantage” of the pandemic: “*For some high conflict families, the pandemic was seen as an opportunity to restrict or prohibit parenting time*” (survey respondent)
- *Ribeiro v Wright*, 2020 ONSC 1829: presumption that parent-child relationships should continue

Concerns re: limited court access

- Increased conflict but harder to resolve: “*The stress of the pandemic has increased conflict levels but left parties less able to access timely resolution from the court*” (survey respondent)
- Children exposed to more conflict, for longer: “*Children will be in a ‘holding pattern’ waiting for parties to reach resolutions*” (survey respondent)
- Judicial emphasis on cooperation: “*Right now, families need more cooperation. And less litigation*” (Pazaratz J., *Ribeiro v Wright*)

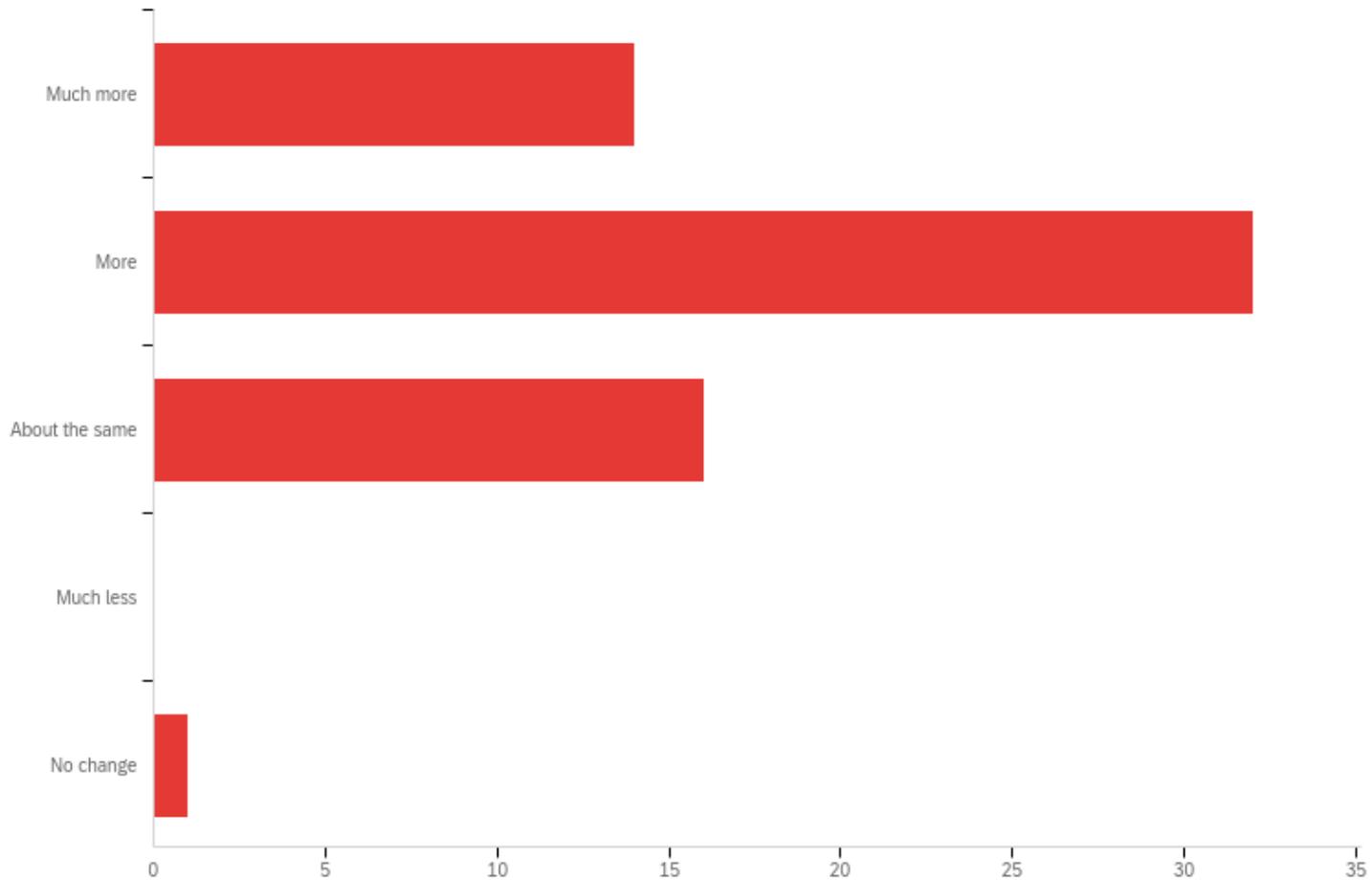
Family Violence

Claire Houston

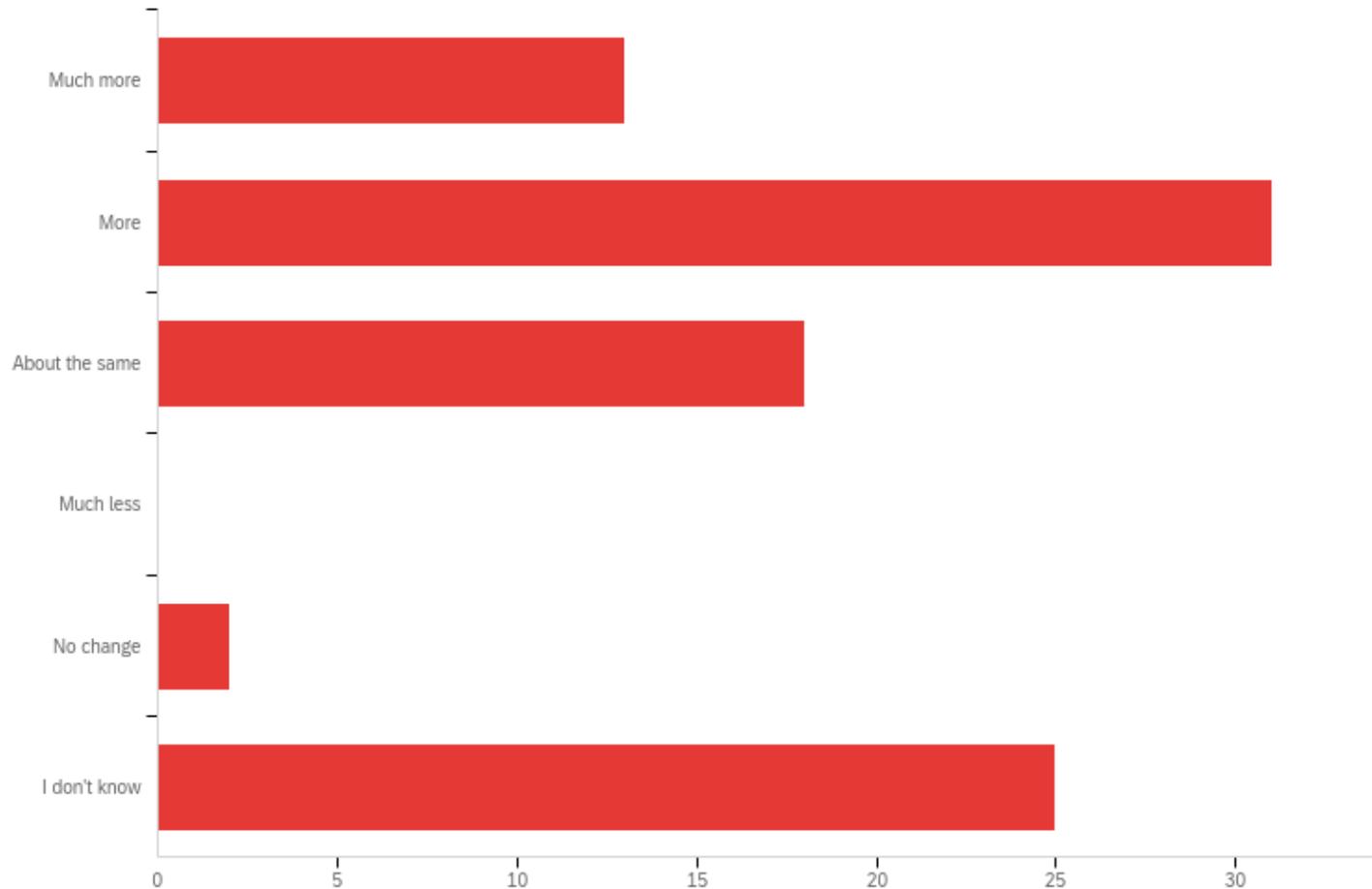
The pandemic and family violence

- Concerns about more family violence, and increase in severity
- Barriers to leaving (including limited access to courts) and fewer supports
- Impact on child protection agencies

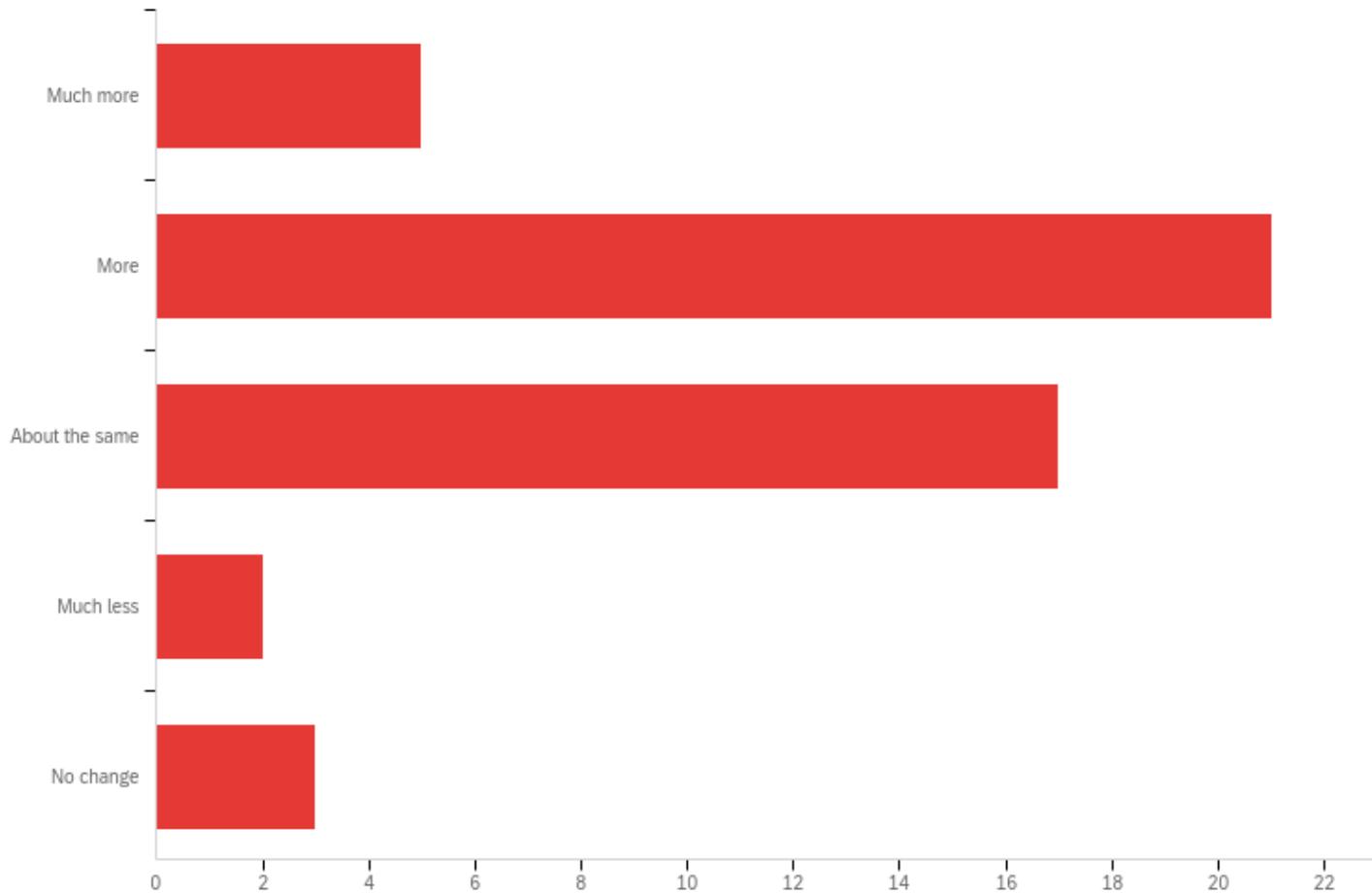
Intimate partner violence in “lockdown”: survey



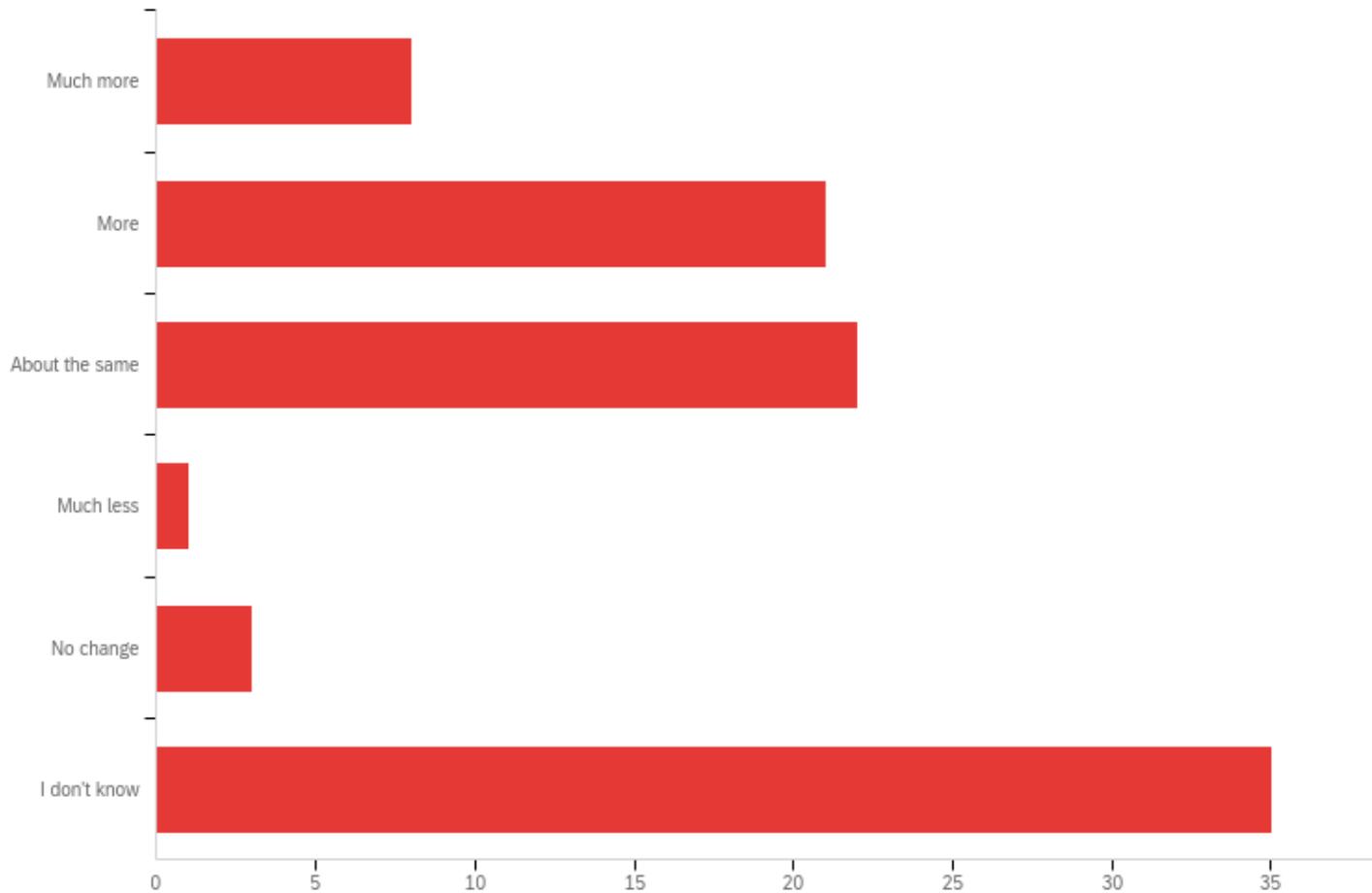
IPV in “re-opening”: survey data



Child abuse and neglect in “lockdown”: survey



Child abuse and neglect in “re-opening”: survey



Family violence in “lockdown”: cases

- IPV allegations in $\frac{1}{4}$ of lockdown cases, including $\frac{1}{4}$ of “triage” cases
- Child abuse and neglect allegations in 11% of family lockdown cases, including 11% of “triage” cases
- No relationship between finding of urgency and family violence allegations

Pandemic's impact on IPV victims: survey

- Increased risk exacerbated by lack of supports and barriers to leaving
- Difficulty accessing courts: “*There are more incidents [of violence] and little ability to get substantive help from the Court, for things like restraining orders there have been 5 to 6 week delays in getting motions heard. [I]t is a crisis.*”
- “There is also a fear to begin the court process as the delay is enormous and this can leave a woman in a dangerous situation for much longer”

Impact on IPV victims, cont.

- May be region specific: *“I am pleased to say that the triage/urgent motion process has been responsive enough to seek and secure important safety-focused parenting/restraining orders”*
- Barriers beyond limited access to justice: *“No where to go”*, financial insecurity, reduced services
- Different impacts on different groups: increased risk for victims of color, Indigenous victims

Pandemic's impact on child protection agencies: survey

- Fewer opportunities to assess risk: *“not being able to have eyes on the child at school or in the community puts kids at greater risk”*
- Mixed reports on number of referrals
 - Increase due to pandemic-related stresses (more IPV, more substance use, etc.)
 - Decrease due to children “hidden” at home

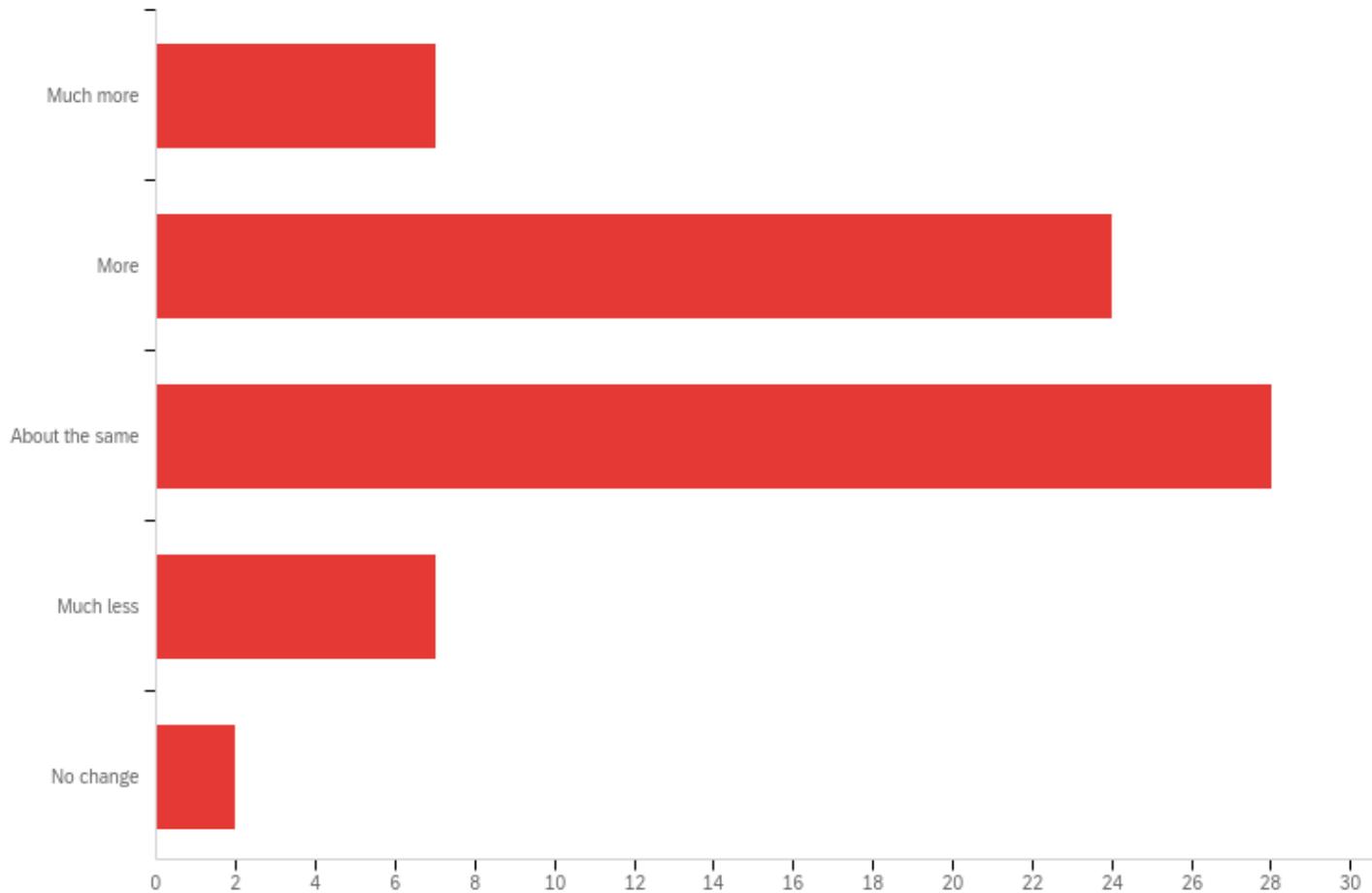
Impact on child protection, cont.

- Some recognition of greater challenges: “*an impossible-to-do job for child protection and no one has acknowledged that to date*”
- Concerns around initial suspension of access: “*This was an extremely difficult time for families with access being cut off*”

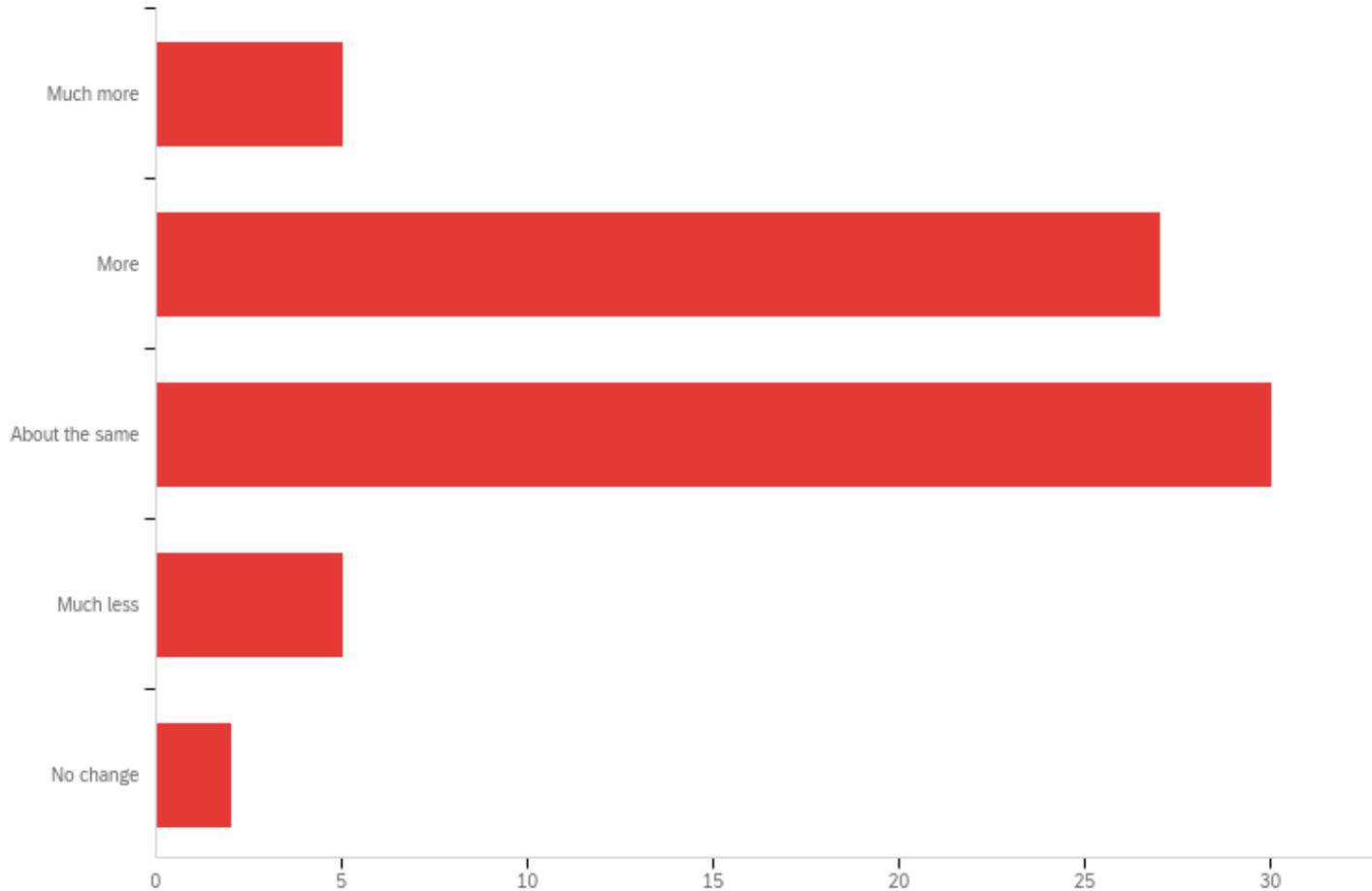
Self-Representation

Nicholas Bala

Self-represented litigants in “lockdown”: survey



SRLs in “re-opening”: survey



SRLs in “lockdown”: cases

- Majority of parties have lawyers
- Self-representation slightly higher among men than women (approximately 25% vs. 15%)
- Tension between cases and survey responses (e.g. “*There are more self-represented litigants because there haven’t been enough family lawyers to accept [Legal Aid] certificates*”)

Mostly negative impact on SRLs: survey

- Limited access to legal information and advice: *“the lack of [the Family Law Information Centre] and duty counsel has hurt”*
- Added complexity: *“frankly, the number of practice directions that have been issued were... overwhelming to me and my office. I cannot imagine how a self rep would navigate the constantly changing rules”*

Impact on SRLs, cont.

- Technology mixed: *“I think for some, the digital world is easier for them and accessing resources and documents online has worked. For many, [limited] access to internet and devices has left them without access to justice at times”*
- Special concern about SRLs in child protection matters

Technology Concerns

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Technology and family violence victims: survey

- Pros: safety benefits of avoiding in-person hearings
- Cons: hearing perpetrators' voice in home, perpetrator seeing victim's home, perpetrator discovering victim's phone number, other safety issues

“In some cases the judges ordered virtual access to be facilitated by [the residential parent] even though a no-contact order exists. In a couple of cases this has led to more allegations of IPV”

Technology and family violence, cont.

- Access to justice dependent on access to technology: *“A lack of technology such as access to computers could make it almost impossible for [victims] to speak with counsel and attend court appearances”*
- Concerns around privacy: *“We’ve had clients call from cupboards in the basement, trying to find privacy within the home”*

Tentative Conclusions

Rachel Birnbaum

Pandemic impacts

- Concerns about negative impact on high conflict families, and especially children, exacerbated by limited access to courts
- Perceived increased risk to family violence victims, some pandemic-related innovations may increase risk (i.e., remote hearings)
- Concerns about self-represented litigants, including family violence victims, accessing legal services and court

Moving forward?

- Negative impacts of the pandemic felt more by those with fewer resources, same in family law
- Technological innovations also have disparate impacts
- Improving access to technology may help to mitigate disparate impacts: “Access to justice now means access to technology”
- Ensuring essential in-person services, i.e., supervised access, child protection services, summary legal advice/information, court-connected mediation