



THE LAW SOCIETY
OF NEW SOUTH WALES

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2 February 2022

Ms Margery Nicoll
Acting Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: john.farrell@lawcouncil.asn.au

Dear Margery,

Fair Work Commission: The future of online proceedings

Thank you for the opportunity to contribute to the Law Council submission to the Fair Work Commission (**'the Commission'**) on the future of online proceedings.

The Law Society's Employment Law Committee has contributed to this submission. Our response is also informed by the results of a Law Society survey conducted in July/August 2021 (**'the post-COVID survey'**) canvassing the views of our members to better understand how COVID-19 related changes have impacted practitioners in NSW.

At the outset, we would like to commend the Commission for undertaking a review of its online proceedings at this time. As noted in the discussion paper, COVID-19 has had a fundamental impact on the operation of courts and tribunals, including the way in which the Commission hears, administers and conciliates cases. It is vitally important that the Commission harnesses the opportunities of remote ways of working going forward, while ensuring the integrity and accessibility of Commission processes.

The results of the post-COVID survey show that the majority of our members consider that many of the changes brought about by the pandemic should remain a permanent part of their working lives. The changes to litigation are seen as having a positive impact overall, particularly in terms of time efficiencies and cost efficiencies to legal practitioners and their clients.

Our responses to the discussion questions are set out below.

Discussion Topic 1

The Law Society recognises the importance of all parties being able to participate fully and effectively in online proceedings. Given the large number of unrepresented litigants that appear at the Commission, members making decisions as to whether to conduct a hearing in-person or online must be conscious of the attributes that impact capacity for meaningful participation.

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English language ability

In addition to the attributes set out in s 578 of the *Fair Work Act 2009* (Cth), we consider that in conducting remote hearings, the Commission should have regard to a person's English language abilities, particularly where the litigant appears without an interpreter.

We note that the technical jargon associated with telephone and video conferencing may be particularly unfamiliar to those with an ESL background. In telephone hearings, in particular, sole reliance on audio cues could compound difficulties in understanding Commission processes.

To ensure procedural fairness, we refer to the suggestions in the NSW Judicial Commission's *Equality before the Law Bench Book*, including avoidance of technical or legal jargon; the preference to ask one question at a time; and the need to check understanding throughout the hearing.¹

The current practice in the Fair Work Commission is that an interpreter can be provided at no cost to a litigant, provided that they request this service upon lodging an application or the day before a conference or hearing. It may be the case, however, that it becomes apparent in an online hearing that a litigant with limited English skills is experiencing challenges with communication and understanding. In this case, the member should check in with the litigant to determine whether there needs to be an adjournment to proceedings so that an interpreter can be engaged.

Caring responsibilities

Another attribute that should be considered by the Commission is carers' responsibilities which may impact a litigant's or lawyer's ability for effective participation in online proceedings.

There has been increasing recognition from state and federal courts of the pressures facing the profession in the context of the COVID-19 pandemic and practitioners have been encouraged to approach the court to seek appropriate flexibility where necessary.² In the context of the Commission, we encourage the development of guidelines or a policy that focuses on providing maximum flexibility to practitioners and litigants with carers' responsibilities working in the fair work jurisdiction.

Such a policy, for example, might encourage registrars and Commission members to give due regard to carers' responsibilities when making decisions around the listing of hearings, including their time, duration and whether it is appropriate that they are held online. It will depend on the individual parties and/or practitioners as to whether in-person or remote hearings may be the most suitable option. We consider that the development of such a policy would assist in reducing what might be perceived as the stigma of seeking flexibility because of caring responsibilities.

Discussion Topic 2

Procedural fairness and impartiality play a significant role in the way in which Commission hearings are conducted. It is necessary that parties have confidence in online processes where they are used. As noted in the discussion paper, online proceedings should be avoided where they impede a party from putting their case to the Commission or cross-examining witnesses.

¹ Judicial Commission of NSW, *Equality Before the Law Bench Book*, Release 19 - December 2021.

² Supreme Court of NSW, '[Media Announcement](#)' (14 September 2021); Federal Court of Australia, Letter from Chief Justice Allsop AO (14 September 2021).

We note that in certain matters in the fair work jurisdiction (eg unfair dismissal proceedings), questions of demeanour in certain circumstances inform the Commission member's assessment of the overall credibility of a witness. The ability to observe a witness in the witness box can also inform the tactical decisions of the person undertaking the cross-examination. There is a danger that the online cross-examination of witnesses, particularly where technical difficulties are experienced (eg falling out/blurring of screen), could lead to unfair outcomes for both the party performing the cross-examination and the party being cross-examined.

We do note in this context, however, that some judges of the Federal Court have remarked that AVL technology has enhanced their ability to assess demeanour. In *Capic v Ford Motor Company of Australia Limited (Adjournment)* [2020] FCA 486 at [19], Justice Perram remarked that in an online proceeding his 'perception of the witness' facial expressions is much greater than it is in Court'. Such sentiments have been echoed by various other judges,³ but some judges have adjourned hearings on the basis that the opportunity to assess credit was diminished.⁴

In light of the above, the Law Society considers that, apart from exceptional circumstances, there should always be at least the opportunity for in-person hearings involving the cross-examination of witnesses. Commission members should also be attuned to other factors that might have a bearing on the procedural fairness of the hearing, including whether both parties have access to technology that means they are afforded a high-quality online experience.

Discussion Topic 3

Some members have noted that there may be a perceived loss of formality in online proceedings, particularly for those who are unfamiliar with Commission processes. The Law Society therefore recommends that Commission Member explicitly remind witnesses of the gravity of giving sworn evidence in this setting.

Discussion Topic 4

Some of our members have raised concerns about the way in which online hearings have impacted open justice. They have noted that even in cases where the public can access the hearing via audio-visual link, some members of the public do not have access to a suitable device or a stable internet connection. In particular, barriers may exist for elderly people, those with disability and those in remote locations.

We consider that the principle of open justice is compromised where only those participants that are e-mailed the MS Teams link are able to observe hearings. Video and dial-in details should be published for all hearings, including case management or interlocutory hearings. All cases that normally would be open to the public should be open to the public in an online setting.

We note that current arrangements at the Commission require a member of the public to contact the relevant chambers by 8.30am on the day of the hearing so that access can be arranged. If online hearings are to remain, we suggest that the Commission considers ways to ensure broader and easier access for the general public to the virtual court.

Discussion Topic 5

The post-COVID survey identified positive aspects to the online court environment, including time efficiencies for the legal practitioner, client and other parties and cost efficiencies. Members also identified a positive impact on access to justice, which may reflect the

³ See *Australian Securities and Investments Commission v GetSwift Limited* [2020] FCA 504 at [33] per Lee J; *Tetley v Goldmate Group Pty Ltd* [2020] FCA 913 at [16] per Bromwich J.

⁴ See *David Quince v Annabelle Quince* [2020] NSWSC 326 at [7] per Sackar J. See also discussion in Michael Legg and Eryn Newman, 'Evaluating witnesses in an online court', LSJ, 1 December 2021.

experiences of particular users identified in the discussion paper, including Aboriginal and Torres Strait Islander court users as well as those with mental illness.

As set out above (Discussion Topic 2), there are serious concerns about the cross-examination of witnesses in online proceedings. Other concerns include impacts on client and lawyer communications and the ability to settle a dispute early. It is often the personal interactions between lawyers at the interlocutory stage or during the hearing that bring about a settlement. Opportunities for informal settlement talks in the online environment, by contrast, are rare to non-existent.

Discussion Topic 6

The Commission should be attentive to the possibility of a person being coerced or intimidated while giving evidence in the online environment. It is not necessarily the other party to a matter that may be exerting influence on the witness. Pressures could arise for people, particularly women, experiencing family violence, for whom home is not a safe place from which to participate in a Commission hearing. It should be made clear to parties whom they may contact at the Commission if they anticipate their participation in online proceedings will be compromised so that they may request alternative arrangements.

Discussion Topic 7

We are aware that there have been some concerns over the increased use of telephone interpreting in court proceedings. Telephone interpreting is typically recommended for short meetings or proceedings only, given that reliance on audio cues often cannot achieve the high levels of accuracy and nuance demanded by court interpreting.

We think it would be valuable for the Commission to engage with interpreters further to ensure that they are able to continue to provide high-quality interpreting for Commission proceedings. It may be incumbent on the Commission members to adapt the way they preside over proceedings, for example ensuring that adequate time is provided for consecutive interpreting.

Discussion Topic 8

The Law Society considers that the Commission's court book process works well for online proceedings. However, it is important that there is a flexible mechanism in place to provide additional documents to the Commission during the course of a hearing which, if necessary, can then be shown to a witness. There should be an agreed protocol for achieving this which focuses on maximising efficiency and accessibility.

Discussion Topic 9

The Law Society understands that its members have adapted well to the use of MS Teams in proceedings, including those before the Commission.

We suggest that it may be useful for the Commission to provide guidelines in the manner of those prepared by the Federal Court to alert practitioners and other participants to ways to maximise their experience on Microsoft Teams.⁵

Discussion Topic 10

While certain proceedings, particularly case management or directions hearings, are well suited to online hearings, as set out in the discussion paper and in the responses above, it is necessary for the Commission member hearing the matter to take account not only of the attributes and circumstances of individual participants but also the nature of the proceedings themselves.

⁵ Federal Court of Australia, 'A guide to online hearings and Microsoft Teams', issued 2 April 2020. <https://www.fedcourt.gov.au/online-services/online-hearings>.

We note that the option for hearings to take place in person is very important to our members. In the post-COVID survey, 69 per cent of members agreed there should always be this opportunity. Relevant considerations included the parties' location; the parties' preferences; the urgency of the matter; whether the parties were represented; whether cross-examination is required; the length and complexity of the matter and whether it is contested; the nature of the evidence; and issues around access to technology.

If you wish to discuss these issues or require further information, please contact Sophie Bathurst, Policy Lawyer, on (02) 9926 0285 or email sophie.bathurst@lawsociety.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Joanne van der Plaats', with a long horizontal stroke extending from the end of the name.

Joanne van der Plaats
President