



Law Council
OF AUSTRALIA

The future of online proceedings

Fair Work Commission

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 90,000¹ lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2022 Executive as at 1 January 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Acting Chief Executive Officer of the Law Council is Ms Margery Nicoll. The Secretariat serves the Law Council nationally and is based in Canberra.

¹ Law Council of Australia, *The Lawyer Project Report*, (pg. 9,10, September 2021).

Acknowledgement

The Law Council is grateful for the contributions of the Law Society of New South Wales, the Queensland Law Society and the Industrial Law Committee of the Federal Litigation and Dispute Resolution Section.

Introduction

1. The Law Council is grateful for the opportunity to provide this submission in response to the Fair Work Commission's (**Commission**) Discussion Paper entitled *The future of online proceedings (Discussion Paper)*.
2. The Law Council commends 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 important that the Commission harnesses the opportunities of remote ways of working going forward, while ensuring the integrity and accessibility of Commission processes.
3. In July/August 2021 the Law Society of New South Wales conducted a survey of its members (**the post-COVID survey**) canvassing their views to better understand how COVID-19 related changes have impacted practitioners in NSW. The results of the post-COVID survey show that the majority of its 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.
4. Online appearances also have positive impacts for those practitioners who work remotely or for individuals where work and/or carer commitments, location or disability or other health needs would prevent or make it difficult for them to attend proceedings in person.
5. However, it is important to note that audio-visual link (**AVL**) hearings have drawbacks and that not all hearings are suited to the use of AVL technology. The decision as to how a hearing is conducted is therefore a matter of discretion, taking into account a range of factors including the views of the parties. Reasons for a matter not being suited to AVL include where a party has difficulty accessing technology and where contested witness evidence is to be given.
6. The Commission should consider publishing a guidance note as to when a virtual hearing will and will not ordinarily be adopted, to create a level of certainty for parties and their advisers regarding the likely approach (and the associated costs).
7. Circumstances where it may be appropriate for the Commission to proceed with a virtual hearing include:
 - directions hearings or case management conferences;
 - when requested by a party for hearings where no oral evidence is to be called;
 - urgent matters where the available Commission member is located in a city other than the one where the parties are located and/or one or more of the parties are located in different states; and
 - where otherwise jointly requested by the parties.
8. The Commission should consider advising that a virtual hearing is not usually suitable for circumstances including:
 - (a) multi-day hearings;
 - (b) hearings involving contested witness evidence; and

- (c) final hearings involving self-represented litigants who need guidance to ensure a fair hearing.
- 9. Consideration should be given to whether matters should proceed with one party in person and the other by AVL, as has occurred in some forums during lockdowns affecting some parties but not others.
- 10. Care must be taken to ensure that any move to embrace AVL hearings does not create additional barriers to justice. There are many parties who do not have ready access to technology, or the capacity to use it. Even where parties have access to the technology, an AVL hearing may be suboptimal (for example it may be difficult for a party to appear from home where other persons including children are present).
- 11. The Law Council understands that the President of the Commission has identified the potential to build upon the notion of hubs or dedicated spaces proposed by some courts, by hiring office space in buildings in regional centres fitted with the necessary technology to allow litigants to appear without having to travel to a capital city. This would be a positive initiative to aid access to justice.
- 12. Finally, for hearings that are not in person, it is important that the presiding member(s), advocates, and any current witness have their camera turned on at all times when the hearing is in session. The occasional practice of presiding members having their camera off for part or all of a hearing has the potential to reduce the appearance of a proper determination of the matter before the Commission. That is, parties may feel that their case has not been heard if they have not been able to see and interact with their adjudicator effectively.

Discussion Topic 1 – Attributes that prevent effective participation

- 13. The Law Council recognises the importance of all parties being able to participate fully and effectively in online proceedings before the Commission. 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.
- 14. The Law Council notes that this Discussion Topic refers to attributes that are beyond those set out in section 578 of the *Fair Work Act 2009* (Cth) (**FW Act**). Some additional attributes are discussed further below. However, it is important to note that for some people, the use of AVL technology may not be an obstacle and instead may be beneficial – for example, online proceedings can be significantly more accessible for persons with particular mobility or hearing disabilities.

Access and ability to use technology

- 15. A readily identifiable additional obstacle is access to the technology and the ability to effectively engage with the technology. While this may not be an ‘attribute’ as set out in section 578 of the FW Act, it is relevant in determining whether a hearing should take place online. Difficulties in accessing or using technology spans all demographics and should not be assumed either way.
- 16. A recommended approach is the use of a pre-hearing process, early in the process of a matter being prepared for hearing, using the technology and assessing each party’s capacity to present their case, before the matter is set down for an AVL

hearing. Where applicable, consideration should also be given in relation to witnesses as discussed below.

17. Where the parties involved have appeared previously at AVL hearings, such as representatives who have a demonstrated capacity to use the technology to support their effective participation, there may not be a need for such pre-hearing assessments, however this will need to be assessed on a case-by-case basis.

English language ability

18. The Commission should have regard to a person's English language abilities, particularly where the litigant appears without an interpreter.
19. The technical jargon associated with telephone and video conferencing may be particularly unfamiliar to those communicating in English as a second language. For telephone hearings in particular, sole reliance on audio cues could compound difficulties in understanding Commission processes.
20. To ensure procedural fairness, the Law Council refers to the suggestions in the NSW Judicial Commission's *Equality before the Law Bench Book*, including for members and advocates to, wherever possible:
 - avoid technical or legal jargon;
 - ask one question at a time; and
 - check understanding throughout the hearing.²
21. The current practice in the 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. However, it may be the case 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

22. Another attribute that should be considered by the Commission, as listed in section 578 of the FW Act, is carers' responsibilities that may impact a litigant or lawyer's ability to effectively participate in online proceedings.
23. 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.³ In the context of the Commission, the Law Council suggests 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.
24. 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

² Judicial Commission of New South Wales, *Equality Before the Law Bench Book* (Release 19, December 2021) <<https://www.judcom.nsw.gov.au/equality/>>.

³ Supreme Court of New South Wales, 'Media Announcement' (14 September 2021); Federal Court of Australia, Letter from Chief Justice Allsop AO (14 September 2021).

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. The Law Council considers 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 – Impact on ‘procedural fairness’

25. 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 full case to the Commission or cross-examining witnesses.

Format of the hearing

26. AVL hearings can impact procedural fairness where a party cannot effectively use the technology or there are other factors which impact on a party being able to fully participate in a matter. This can affect the case which is presented. One example is where a party (particularly an unrepresented person) or a witness may abandon their point due to pressure created by issues accessing documents.
27. Early case management can assist in identification and management of difficulties, such as ensuring that all documents to be used are accessible and normalising the process for referring to documents.
28. While coaching a witness is always a potential issue, it is clearly an even greater risk when the Commission cannot see the environment the witness is in. In these situations, there is a risk that those who do the wrong thing have an unfair advantage to those who abide by the rules. There is also an increased risk where proceedings feel less formal (as they may in a virtual context), that those unfamiliar with court processes may not be aware that they are in breach of witness requirements (for example, by relying on notes) or may perceive such breaches to be less serious.
29. AVL hearings also present new challenges in relation to fatigue. AVL hearings operate better with more frequent, shorter breaks. The traditional approach of in-person hearings of a mid-morning and mid-afternoon break, with a longer ‘lunch’ break is not suited for AVL hearings.

Cross examination

30. In certain matters in the fair work jurisdiction, assessment of body language and demeanour can 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 (for example, image interruptions or the blurring of the screen), could lead to unfair outcomes for both the party performing the cross-examination and the party being cross-examined.
31. The Law Council does note, however, that some judges of the Federal Court of Australia (**Federal Court**) have remarked that AVL technology has enhanced their ability to assess demeanour. For example, in *Capic v Ford Motor Company of*

Australia Limited (Adjournment),⁴ 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,⁵ while other judges have adjourned hearings on the basis that the opportunity to assess credit was diminished.⁶

32. In light of the above, the Law Council considers that, apart from exceptional circumstances, there should always be at least the opportunity for in-person hearings if there is to be 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 – Perception

33. Some members of the profession have noted that there may be a perceived loss of formality in online proceedings, particularly for those who are unfamiliar with Commission processes.
34. The absence of formality in respect of self-represented parties or individual applicants can affect how they interact in the proceedings and can also affect whether they feel that they ‘have had their day in Court’ (particularly where the Bench conducts the hearings without turning their camera on, or there is levity).
35. Similarly, it can affect witness evidence. Lack of familiarity with technology may see parties ‘cut corners’ or not pursue matters out of frustration or a desire to bring an AVL hearing to an end more quickly than is warranted.
36. Whilst having regard to section 578, the Commission needs to be able to control its process and to be seen doing so. This can be more difficult in proceedings with a self-represented litigant.
37. The Commission could address these issues in part by:
 - (a) using ‘Commission’ branded backgrounds (alternatively a curated background with decent lighting can assist) with particular attention paid to camera setup (i.e. how much of the person is seen);
 - (b) maintaining the formalities of an in-person proceeding wherever possible; and
 - (c) providing explicit reminders from Commission member(s) to participants of the gravity of giving sworn evidence in this setting.

Discussion Topic 4 – External observation

38. The COVID-19 pandemic has tested the principle of open justice in Australia, with the rapid shift to online or ‘virtual’ courts and tribunals curtailing the ability of the general public and the media to access hearings. While courts and tribunals, including the Commission, have responded admirably to introduce ways for the

⁴ [2020] FCA 486, [19].

⁵ See *Australian Securities and Investments Commission v GetSwift Limited* [2020] FCA 504, [33] (Lee J); *Tetley v Goldmate Group Pty Ltd* [2020] FCA 913, [16] (Bromwich J).

⁶ See *David Quince v Annabelle Quince* [2020] NSWSC 326, [7] (Sackar J). See also discussion in Michael Legg and Eryn Newman, ‘Evaluating witnesses in an online court’, *Law Society Journal* (1 December 2021).

public to view proceedings, open justice remains an important principle which must be kept front of mind as the use of online proceedings continues.

39. Some members of the profession 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.
40. The Law Council considers that the principle of open justice is compromised where only those participants that are e-mailed the Microsoft Teams link are able to observe Commission hearings. Wherever possible, all Commission proceedings that normally would be open to the public should be open to the public in an online setting.
41. 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, the Law Council suggests that the Commission considers ways to ensure broader and easier access for the general public to the virtual court.
42. However, it is important to consider the format in which observers can observe a hearing and how much control they can have. The Law Council understands that when observers of hearings have had any control (i.e. a Microsoft Teams link was distributed, and they are able to unmute themselves) this has led to issues and interruptions. Livestream options whereby observers can only watch and listen but cannot interrupt proceedings are preferable and a real access to justice improvement.

Discussion Topic 5 – Benefits and drawbacks

Benefits

43. The post-COVID survey conducted by the Law Society of New South Wales identified that there are positive aspects to the online court environment, including time efficiencies for the legal practitioner, client and other parties and cost efficiencies.
44. The Law Council is aware that online proceedings have been particularly beneficial in the context of directions hearings or other short hearings, given the cost/benefit of the time they take versus the time taken to get to the hearing in person. Online proceedings have also been effective for matters involving no witnesses, where all documents are appropriately paginated and the advocates are experienced, such as most appeals.
45. Members of the profession have also identified a positive impact on access to justice, which may reflect the experiences of particular users identified in the Discussion Paper, including Aboriginal and Torres Strait Islander court users, as well as those with mental illness.

Drawbacks

46. Members of the profession have noted that online proceedings can be harder, more tiring and require a different set of advocacy skills than in-person proceedings,

including higher levels of organisation and experience/confidence in using technology.

47. Where one party has less skills or experience, or experiences difficulties in relation to their participation, whether as an advocate or witness, then challenges arise. Additionally, there is potential for technical issues to be manipulated (for example, refusing to appear on camera). Often it falls to the Commission member or their associate to try to 'troubleshoot' or assist a party or a matter is 'paused' for a time whilst a problem is addressed.
48. 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, noting that 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 – Guidance regarding witness interactions

49. The Law Council has been made aware of instances (largely in other forums) of witnesses participating in hearings in problematic settings (for example while in a car or public area) or receiving assistance such as pre-prepared notes, coaching or prompting while appearing (despite saying that no-one else is in the room).
50. In the Law Council's view, the Commission should consider developing a guidance note to witnesses, which the Commission or a party calling the witness can have sent prior to an AVL hearing, which identifies what is expected of a witness. That is,
 - they are to be alone in a room;
 - have access to technology and alternative means of contact (such as mobile telephone) in the event of experiencing difficulties during or before a witness gives evidence; and
 - must avoid reading notes or documents whilst giving their evidence.
51. The Commission should also 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 – Interpreters

52. The experience of using interpreters in the Commission and other tribunals is that the use of an interpreter will invariably increase the time involved in matters. However, this is considered necessary to ensure that parties (including witnesses) understand questions asked of them and the Commission member and advocates understand the evidence being given.
53. The Law Council is 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 and/or Commission interpreting.

54. In the Law Council's view, it would be valuable for the Commission to engage with interpreters 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 – Court books

55. The Law Council considers that the Commission's court book process has worked reasonably well but could be improved. Currently:
 - (a) the books typically contain every single document (including covering emails) rather than what would ordinarily be in a court book; and
 - (b) are often provided a day before the hearing, when everyone has been steadily working on other documents.
56. An alternative approach would be to direct the parties to jointly produce an electronic court book at least 7 days before the hearing, following a standard format. Where both sides are incapable of doing this making it impractical, an in-person hearing may be the more appropriate approach.
57. Hearings typically involve the provision of documents which are not in the court book, for various reasons. 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. This can be addressed by advocates who have the technical skills (or by an Associate, if necessary) by screensharing the document, allowing all parties to view the document at the same time or the document being placed into an accessible file. There should be an agreed protocol for achieving this which focuses on maximising efficiency and accessibility.

Discussion Topic 9 – Microsoft Teams

58. The Law Council understands that members of the profession (and the Commission) have adapted well to the use of Microsoft Teams in proceedings, including those before the Commission, and that the experience of using Microsoft Teams has been consistently positive.
59. However, there are some potential actions which could improve the experience of using Microsoft Teams, including:
 - (a) reviewing the AVL setups being used by Commission members both at home and in chambers to confirm camera quality and placement, access to headphones/microphone and screen availability and placement;
 - (b) transitioning entirely to Microsoft Teams for phone conferences (when suitable) rather than the various different alternatives that have been used in some instances;

- (c) imposing a requirement for parties to produce court books earlier (see discussion above); and
- (d) using case management procedures (as discussed above) to identify any problems that may arise in advance of the online proceedings taking place.

60. The Law Council also suggests that the Commission consider the development of 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.⁷

Discussion Topic 10 – Online as default

61. 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.
62. In some circumstances, Commission members have conducted hearings via Microsoft Teams but the parties are advised that they do not need to turn on the cameras. This is effectively a teleconference and defeats the purpose of listing a matter for a AVL hearing.
63. The table below, indicates the general circumstances in which use of AVL may or may not be suitable.

Hearings which are suitable for AVL (but AVL need not necessarily be adopted)	Hearings in which AVL is not desirable	Hearings suitable for phone
<ul style="list-style-type: none"> • Appeals. • Disputes involving little or no contested evidence. • Technical matters with experienced parties. • Award matters (because it is in the public interest that these be online as it significantly increases public accessibility). 	<ul style="list-style-type: none"> • Multi-day hearings generally. • Unfair dismissals, adverse action, stop bullying and stop sexual harassment orders (which are more likely to involve inexperienced witnesses/parties and contested evidence). • Trauma informed processes (although they can also have some benefits and should be considered on a case-by-case basis). 	<ul style="list-style-type: none"> • Programming hearings. • Short matters (for example, disputes about production orders). • Conciliation conferences for unfair dismissal applications.

⁷ 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>.

64. The Law Council notes that the option for hearings to take place in-person remains very important to many members of the profession. In response to the Law Society of New South Wales 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.