

6 April 2021

Our ref: MC-LP

Justice Nye Perram
Law Courts Building
Queens Square
Sydney NSW 2000
DX 613 Sydney

By email: [REDACTED]

Dear Justice Perram

Use of Technology in the Federal Courts

Thank you for your correspondence of 23 February 2021 and the opportunity to provide feedback on the Federal Court of Australia Digital Practice Committee consultation. The Queensland Law Society (**QLS**) appreciates being consulted on this important consultation.

We note that the Federal Court is considering how it will utilise digital technology in the future. We have provided the below comments to the Law Council of Australia, who we understand is also preparing a response to your correspondence.

QLS has long advocated for the increased use of technology in Federal and State courts, tribunals and commissions. As noted in previous consultations, the increased reliance on teleconferencing and videoconferencing by Federal Courts during the COVID-19 pandemic has improved access to justice and has created significant efficiencies by reducing the time and costs incurred by parties and their representatives in attending court.

Court appearances

COVID-19 pandemic

Prior to the COVID-19 pandemic, Federal Court hearings, including interlocutory and case management hearings, were conducted in-person, as well as via video-link from other interstate Federal Court registries, as necessary. During the “lockdown periods” all Federal Court hearings were conducted by video-link using Microsoft Teams software to allow practitioners and parties to appear from their home or office. This process enabled both practitioners and clients who do not reside in a city where Federal Courts are located to attend hearings.

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Currently, practitioners, clients and importantly, witnesses, are reluctant to travel interstate to appear in court in case there is a sudden change in health directives and borders and they are not permitted back into their home state or forced to quarantine.

Court appearances generally

QLS members have provided positive feedback on the ability to appear in court remotely. Where possible, their preference is to do so where there are audio and video capabilities, such as via Microsoft Teams, and using a platform that allows break-out rooms.

In our members' experience, documents are able to be referred to easily during hearings by the use of shared screens. Instructions can be provided to practitioners or counsel during hearings via email and text message.

By way of example, in Federal Court matters listed in Sydney, this change to practice has enabled case management hearings (which occur reasonably regularly) to be conducted with:

- counsel appearing in Sydney;
- solicitors instructing from Brisbane; and
- clients attending from Canberra,

all working from home or office.

In comparison, the pre-COVID interstate video-link appearances using Federal Court facilities did not easily enable persons from multiple states to participate in hearings, as described above.

The benefits of this change to practice include:

- enabling clients to observe and participate in proceedings who may not have been able to do so previously because travel for interlocutory processes was not practical or convenient;
- obtaining client participation in interlocutory processes to enable matters to be progressed more expeditiously, for example, more effectively reducing issues in dispute at an early stage in the proceedings;
- saving time and cost associated with travel for practitioners and clients not located in the same city as a Federal Court registry;
- reducing other legal costs, such as time recorded, because hearings are able to be scheduled so standby or waiting times for practitioners are reduced or eliminated.

On this basis, QLS supports the retention of this change to court processes, particularly for case management hearings and interim matters.

For these matters, and other interlocutory matters, we suggest that the default position be that these appearances are remote/virtual, but where this is not appropriate, a party or the Court can seek alternate arrangements. It would be useful for some criteria published to be published to assist the parties and the Court.

Some members have expressed concern about final hearings conducted via video-link, particularly in relation to the ability to properly and effectively cross-examine witnesses. Self-represented parties and vulnerable parties may also experience greater difficulty navigating a technology-facilitated final hearing. As suggested above, some criteria be developed to assist in determining whether a matter is suitable for a final hearing via video-link.

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Finally, it is noted that to give effect to Federal Court hearings being conducted in open court pursuant to s 17(4) of the *Federal Court of Australia Act 1976* (Cth), standard orders usually apply to enable members of the public to access hearings on Microsoft Teams on the basis they are prevented from making any audio or video recordings or interrupting the hearing. Any contravention may constitute contempt of court.

Oral evidence

Our members practising in civil jurisdictions have generally found that oral evidence can be given via video in an effective way. There are significant other benefits to this including cost savings and witness availability. However, we are aware that in some matters and in some jurisdictions there may be a preference for giving evidence in-person. There have also been matters where the process of giving evidence remotely can cause delays in proceedings.

Trials with special considerations – Native title

Our members who appear in native title matters have advised there are been advantages to the use of technology in conducting hearings.

Court listing practices

As stated above, listing practices which do not require a lawyer or party to be physically present in a court or to wait for their matter to be heard after a callover process, have been welcomed by the profession and have led to significant improvement in efficiencies.

Our members are reluctant to revert to the previous practice of parties gathering in a courtroom and possibly waiting for considerable time before their matter is mentioned. Such a practice remains difficult in light of health directives more importantly and increases the cost and burden on lawyers (particularly sole practitioners or those who need to travel, for example into the Brisbane CBD), their staff and their clients.

Use of technology for documentation and case management

While court documents are not specifically being considered by the Digital Practice Committee, we make the point that parties to a proceeding need to be able to interact with the court files in an efficient and effective way and this goes hand-in-hand with the ability to appear remotely. Documents should be able to be accessed electronically once filed.

Any improvements to this process will be welcomed by the profession and we are seeking similar improvements in state jurisdictions as a priority.

Funding and access to justice issues

It is critical from both an access to justice perspective and for the effective and efficient operation of the courts that judges, registries and courthouses, the profession and parties/the

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community have the requisite resources to enable interaction with the courts and justice system in the most appropriate way.

A significant number of Queenslanders (and therefore businesses and legal practitioners) do not reside in major cities and are located hundreds of kilometres away from these centres. Therefore the use of technology in conducting business and participating in legal proceedings is of great importance. However, this is often limited by the lack of upgraded infrastructure in regional courthouses. Addressing this issue should be a priority for all jurisdictions to enable the measures to be truly effective.

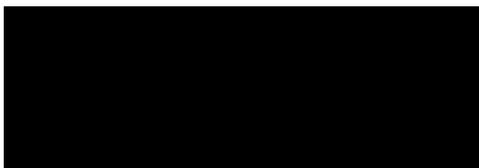
In addition to better resourcing regional and remote areas, community legal centres, whose lawyers either act for clients, or assist self-represented litigants, require appropriate funding to ensure they are able to utilise the same technology and adopt the same practices as other parties.

We would also add that ability to appear by teleconference or videoconference enables members of the profession who have flexible work hours or who work remotely to appear in court on behalf of their clients which may not have otherwise been possible. Retaining these measures will increase workforce participation and lead to increased professional development and career progression for these practitioners.

It would be beneficial if there was uniformity between the technology used in State and Federal jurisdictions. We appreciate this may not always be possible, however, we would be pleased if there could be engagement between the courts/jurisdictions on this issue. There may be benefit in learning from shared or varied experiences.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Elizabeth Shearer
President