

## 2023 QUESTIONNAIRE OF THE FIRST STUDY COMMISSION IAJ-IUM

### RESPONSE FROM AUSTRALIA

#### ‘The Effects of Remote Work on the Judicial Workplace and the Administration of Justice’

#### 65<sup>th</sup> Annual Meeting of IAJ - Taiwan

#### Judge Caroline Kirton KC<sup>1</sup>

#### Federal Circuit and Family Court of Australia

*The Australian court system is made up of a federal jurisdiction, and the various State and Territory jurisdictions. The arrangements for the remote work of judges varies from court to court. This response concentrates on the arrangements in the Federal Circuit and Family Court of Australia (Court).*

#### 1. Remote work of judges in your country

##### a. Were judges permitted to work remotely in your country prior to and/or during the COVID-19 pandemic? If yes, please give examples. Was technical equipment made available to the judges to enable them to work remotely?

Prior to the Covid-19 pandemic, it was uncommon for judicial officers to work remotely. This was particularly the case for hearings, which were almost exclusively held in person at the Court. Where judges were judgment writing only, working remotely took place. Although the Court’s document management system was moving from paper-based to digitised in 2020, digitisation was for the combined purpose of moving away from a paper-based system, as well as to assist in the remote work of the Court.

The federalised nature of the Australian judicial system means that some measures were particular to a single jurisdiction or single state or territory. The Court adopted health protocols to permit judges to work remotely prior to and during the Covid-19 pandemic. Pre-existing enactments were mainly used as a springboard for more narrowly tailored provisions.<sup>2</sup>

Practice Directions were and have been issued by the Chief Justice which set out the management of family law, migration and general federal law proceedings in the context of remote and hybrid work. Hearings were able to proceed by way of videoconference on Microsoft Teams. Judges and their chambers were able to operate virtually using Microsoft Teams. In addition, to facilitate matters being dealt with electronically, parties were to “e-file” or “e-lodge” all documents with the Court. The Court provided judges with individual laptops to enable them to work remotely, and provided ongoing IT assistance to facilitate the operation of the Court during the Covid-19 pandemic.

##### b. What is the status of remote work by judges in your country now? Do many judges still work remotely in your country, and to what extent?

Judges of the Court remain entitled to work remotely. As the technology exists for judges to readily work remotely, many continue to do so, particularly during periods of judgment writing. The extent of remote work by Judges of the Court is primarily limited by necessity, such as where on-site work is

---

<sup>1</sup> Judge C. E. Kirton KC acknowledges the substantial contribution her Associates Laura Hillard and Georgia Brown have made to this response.

<sup>2</sup> Strong, SI, ‘Procedural Law in a Time of Pandemic: Australian Courts Response to COVID-19’, Legal Studies Research Paper Series No 20/38, University of Sydney Law School, July 2020, 3.

required for in-person hearings. The approach adopted by the Court is that final hearings are to be conducted in-person ‘unless directed otherwise by the presiding Judge’.<sup>3</sup>

## **2. Effect on judicial work**

### **a. Did remote work change judicial work in general for better or worse – or both – in your country? Please give examples.**

In many respects, remote work changed judicial work for the better.

With respect to family law, the digital transformation necessitated by the Covid-19 pandemic has enabled vulnerable and regional litigants to have access to justice from their homes or safe environments. Divorce applications have been dealt with by telephone appearance since March 2020, which has been an efficient practice for the Court and litigants, ensuring that parties do not have to travel to court registries, sometimes from long distances, to attend a short divorce hearing.<sup>4</sup> The conducting of electronic hearings has been positive in the time and cost savings for practitioners and litigants as well as the Court in regards to Judges travelling on circuit to regional areas.<sup>5</sup>

With respect to migration law, the conducting of hearings by remote access technology has increased the efficiency of hearings by reducing the time required to convene Court, reducing the rate of non-appearance, decreasing the number of applications reinstated due to reasonable excuse for non-appearance, and reducing the interruptions to proceedings arising from the unavailability of interpreters.<sup>6</sup>

Judicial work has however also been affected negatively by remote work. Remote work has heightened issues in relation to caseload. The question of which matters are urgent and require prioritising, and who decides which matters require urgent action, arises.<sup>7</sup> Remote work also calls for more awareness and action regarding cybersecurity and information protection.<sup>8</sup> The Court has acknowledged that the Covid-19 pandemic, and the remote work necessitated by it, has had an ongoing impact upon the volume of cases the Court can finalise.<sup>9</sup>

### **b. Does the remote work of judges have an impact on the judicial workplace in your country? Negative, positive or both? Please give examples.**

The remote work of judges undoubtedly had an impact on the judicial workplace in a number of ways, both positive and negative.

Positively, the ability of judges to work remotely during the pandemic, and from time to time currently, allows for an acceleration in the rate at which the digitized document management system was accepted and utilised. This meant that the judicial workplace in many respects was made more efficient where paper files were dispensed with. Further, the ease and accessibility of electronic communication between judicial colleagues that came with the Covid-19 pandemic and remote working has been a positive step towards greater, and more widespread judicial collaboration and discussion.

---

<sup>3</sup> Federal Circuit and Family Court of Australia, ‘Hearing Protocol (SMIN-HEARINGS)’: FCFCOA Special Measures Information Notice, 4 November 2022.

<sup>4</sup> Federal Circuit and Family Court of Australia, *Annual Reports 2021-22* (29 September 2022), 139, [5.9].

<sup>5</sup> Federal Circuit and Family Court of Australia, *Annual Reports 2021-22* (29 September 2022), 84-85, [4.4.8].

<sup>6</sup> Federal Circuit and Family Court of Australia, *Annual Reports 2021-22* (29 September 2022), 103, [4.6.1].

<sup>7</sup> ‘Justice System Responds to COVID-19 Crisis’ (2020) 42(3) Bulletin (Law Society of South Australia), 26, 27.

<sup>8</sup> ‘Justice System Responds to COVID-19 Crisis’ (2020) 42(3) Bulletin (Law Society of South Australia), 26, 27.

<sup>9</sup> Federal Circuit and Family Court of Australia, *Annual Reports 2021-22* (29 September 2022), 41, [3.2] and 70, [4.2].

Among the negative impacts of remote work of judges in the judicial workplace includes an unfortunate reduction in rapport and camaraderie between judicial colleagues. Remote work has also meant a decrease in the collaborative and collective nature of judicial work, towards a somewhat more isolated and individual endeavour. This is particularly difficult for those judges appointed to the Court during the course of the Covid-19 pandemic, although the Court has made a great effort to support and resource these judges.

**c. From your point of view, what future effects of remote work on the judicial workplace – negative, positive or both – can be expected?**

The positive and negative effects recognised above can be expected to continue into the future, albeit to a lesser extent, as the effects of the Covid-19 pandemic subside and on-site work is able to occur without issue. The Court has adapted to a more hybrid workplace where remote work can be undertaken where appropriate and beneficial, and negative effects can be mitigated or avoided altogether by working in person.

**3. Effects on the administration of justice**

**a. What are the pros and cons of remote work on the administration of justice?**

Procedural fairness is central to the legal system in Australia and requires the Court to ensure parties are given a full opportunity to present their case, through whatever method this may be done.<sup>10</sup> In *John Fairfax Publications Pty Ltd v District Court of New South Wales* [2004] NSWCA 324 the Court said that ‘the principle of open justice is one of the most fundamental aspects of the system of justice in Australia. The conduct of proceedings in public ... is an essential quality of an Australian court of justice’.<sup>11</sup>

In order to assist with the dilemma of open justice and digital hearings, the Court adopted the practice of including a direction for any person who wished to observe an online hearing to contact the relevant judge’s associate.<sup>12</sup>

Technology offers the prospect of increasing open justice, and by extension the administration of justice, by making the Court’s work more available for wider viewing, provided active steps are taken to address barriers.<sup>13</sup> Remote work can promote equal accessibility by screening virtual hearings in a physical court room or providing a link for virtual hearings to the public.<sup>14</sup> Virtual courtrooms and the reduction of formality can be positive as the traditional structure of court hearings involve ritualistic aspects that could be archaic, exclusionary and intimidating to the wider public.<sup>15</sup>

However, remote work impacts the cultural image of a judge, and makes it more difficult to control privacy and the spread of information, for example recordings of court may be taken and shared

---

<sup>10</sup> Legg, Michael and Song, Anthony, ‘Technology: The Courts and the Pandemic: The Role and Limits of Technology’ (2020) (66) LSJ: Law Society of NSW Journal 66.

<sup>11</sup> *John Fairfax Publications Pty Ltd v District Court of New South Wales* [2004] NSWCA 324, at 18 (per Spiegelman CJ).

<sup>12</sup> McIntyre, Joe, Anna Olijnyk and Kieran Pender, ‘Civil Courts and COVID-19: Challenges and Opportunities in Australia’, Research Paper No 2020-143, University of Adelaide, 6-8.

<sup>13</sup> Legg, Michael and Song, Anthony, ‘Technology: The Courts and the Pandemic: The Role and Limits of Technology’ (2020) (66) LSJ: Law Society of NSW Journal, 65-67, 65.

<sup>14</sup> Legg, Michael et al, ‘Open Justice during a Pandemic: The Role and Risks of Remote Hearings’, 33(2) Public Law Review 155-157.

<sup>15</sup> McIntyre, Joe, Anna Olijnyk and Kieran Pender, ‘Civil Courts and COVID-19: Challenges and Opportunities in Australia’, Research Paper No 2020-143, University of Adelaide, 10.

improperly.<sup>16</sup> It is vital for the administration of justice that technology is used appropriately, taking into account the complexity and specific requirements of the matter at hand.<sup>17</sup>

Remote work can limit the scrutiny and accountability of judges, as the public should see law being administered fairly and without prejudice. Further, the courtroom layout reflects the relationship between participants, conveys legitimacy and authority, is symbolic and contributes to the formality of the legal process. It is difficult to replicate the gravitas of courtrooms in the virtual space.<sup>18</sup>

**b. Does remote work have a positive or negative impact on the administration of justice in general in your country? Please give examples that include, but are not limited to, the quality of the administration of justice.**

The remote work of judges and the Court more generally has impacted upon the administration of justice in both positive and negative respects.

Positively, the provision of remote work allowed the Court to continue to carry out its function during the course of the Covid-19 pandemic, having the effect that cases continued to be heard and finalised. The hearing of matters through video conferencing services such as Microsoft Teams has been said to have in part expanded open justice in that the public and media were able to listen and see hearings from outside the courtroom.<sup>19</sup> The ability of the media to report on the workings of the Court to the broader public facilitates open justice to a large degree.<sup>20</sup>

The expansion of remote work, however, must be tempered by the risk of issues of accessibility, both to technology itself and the particular listing details of each hearing. For example, there exists in Australia a ‘digital divide’ whereby a substantial number of households do not have consistent access to home internet.<sup>21</sup> Remote hearings may present a hurdle where participants do not have a suitable location to access the hearing, do not have suitable means to communicate with legal representatives or the Court, and are older or of non-English speaking background.

The approach of the Court that in-person hearings are a default position, with each judge to exercise their discretion as to whether a virtual hearing would be appropriate in the particular circumstances, is an effective way to ensure that the administration of justice is meaningfully borne in mind in each matter. Further, during the Covid-19 pandemic, the Court demonstrated a willingness to adjourn hearings where there was a risk to unfairness by the hearing proceeding virtually.<sup>22</sup>

The requirement that practitioners and parties lodge all documents for filing using the Court’s electronic filing system necessarily comes with some limitations and potential accessibility issues, although no significant issues have been flagged by the Court thus far. As such, this technological

---

<sup>16</sup> Michael et al, ‘Open Justice during a Pandemic: The Role and Risks of Remote Hearings’ (2022) 33(2) Public Law Review, 157-158.

<sup>17</sup> Legg, Michael and Anthony Song, ‘Commercial Litigation and COVID-19: The Role and Limits of Technology’ (2020) 48(2) Australian Business Law Review, 162.

<sup>18</sup> McIntyre, Joe, Anna Olijnyk and Kieran Pender, ‘Civil Courts and COVID-19: Challenges and Opportunities in Australia’, Research Paper No 2020-143, University of Adelaide, 9.

<sup>19</sup> Bell, Felicity, Michael Legg and Anna Olijnyk, ‘The Use of Technology (and other measures) to Increase Court Capacity: A View from Australia’, Submission to the House of Commons Justice Committee Inquiry into Court Capacity, (19 October 2020), 21.

<sup>20</sup> Hamlyn, Michelle, ‘A Health Check on Open Justice in the Age of Covid-19: The Case for Ongoing Relevance of Court Reporters’ (2020) 42(5) *Bulletin: The Law Society of South Australia*, 6-8, 6.

<sup>21</sup> Bell, Felicity, Michael Legg and Anna Olijnyk, ‘The Use of Technology (and other measures) to Increase Court Capacity: A View from Australia’, Submission to the House of Commons Justice Committee Inquiry into Court Capacity (19 October 2020), 33; Australian Digital Inclusion Index, ‘Digital Inclusion in Australia’ <https://digitalinclusionindex.org.au/about/about-digital-inclusion/>.

<sup>22</sup> Legg, Michael, and Anthony Song, ‘The Courts, the Remote Hearing and the Pandemic: From Action to Reflection’ (2021) 44(1) *University of New South Wales Law Journal*, 126-166, 146.

development of the Court has had neither a positive nor negative impact upon the administration of justice, save for the increased efficiency in filing.

Virtual hearings also present a challenge to the administration of justice in respect of advocacy and litigant's experience of the Court. This includes circumstances whereby practitioners are not able to meaningfully engage with their clients before and during hearings held remotely,<sup>23</sup> the opportunity for interaction and negotiation between practitioners is reduced,<sup>24</sup> there is limited ability to engage with the judge,<sup>25</sup> and the removal or distortion of non-verbal cues and gestures.<sup>26</sup> Ultimately, the experience of the Court in virtual hearings is not the same online as it is in face to face interactions.<sup>27</sup>

**c. Are you aware of the public's perceptions of remote work by judges? Please give examples of positive or negative perceptions.**

Remote work has an impact on the integrity of the justice system, public access to viewing of court hearings, participation of clients or witnesses and litigant access to support services.<sup>28</sup> Remote work can increase accessibility and access to justice and protect vulnerable parties as well as facilitate the potential for parties' and practitioners' flexible working conditions.<sup>29</sup>

The courts need to be efficient and responsive in order to maintain public trust and confidence in line with other sectors of the economy and the public sector.<sup>30</sup> To assist with transparency and awareness the Courts published announcements and practice notes in order assist the public with understanding protocols and the new operation of court proceedings.<sup>31</sup> The perception of security and confidentiality in relation to faster, more remote access must be considered.<sup>32</sup>

Respect for the courts is integral to effective operation of the judicial system. Virtual hearings have consequences for assessing 'contempt' and often allow participants to be more disruptive.<sup>33</sup> A court hearing is a public demonstration of the rule of law which helps ensure public confidence. Virtual hearings can detract from the gravitas of court and create the perception of a loss of fairness.<sup>34</sup>

---

<sup>23</sup> Bell, Felicity, Michael Legg and Anna Olijnyk, 'The Use of Technology (and other measures) to Increase Court Capacity: A View from Australia', Submission to the House of Commons Justice Committee Inquiry into Court Capacity, (19 October 2020), 35.

<sup>24</sup> The Honourable Justice David Hammerschlag, 'Case Managing Building Litigation during COVID-19: "Will We Go Back to the Way We Were?"' (2022) 37(5) *Building and Construction Law Journal*, 437-441, 439.

<sup>25</sup> Legg, Michael, and Anthony Song, 'The Courts, the Remote Hearing and the Pandemic: From Action to Reflection' (2021) 44(1) *University of New South Wales Law Journal*, 126-166, 152.

<sup>26</sup> Legg, Michael, and Anthony Song, 'The Courts, the Remote Hearing and the Pandemic: From Action to Reflection' (2021) 44(1) *University of New South Wales Law Journal*, 126-166, 137.

<sup>27</sup> Legg, Michael and Anthony Song, 'Commercial Litigation and COVID-19: The Role and Limits of Technology' (2020) 48(2) *Australian Business Law Review*, 159-168, 166.

<sup>28</sup> Law Society of NSW, A Fair Post-Covid Justice System: Canvassing Member Views (January 2022), 4.

<sup>29</sup> Law Society of NSW, A Fair Post-Covid Justice System: Canvassing Member Views (January 2022), 4.

<sup>30</sup> Wallace, Anne and Kathy Laster, 'Courts in Victoria, Australia, During COVID: Will Digital Innovation Stick?' (2021) 12(2) *International Journal for Court Administration* Article 9, 12.

<sup>31</sup> Strong, SI, 'Procedural Law in a Time of Pandemic: Australian Courts' Response to COVID-19', *Legal Studies Research Paper Series No 20/38*, The University of Sydney Law School, July 2020, 4-5.

<sup>32</sup> Sourdin, Tania and John Zeleznikow, 'Courts, Mediation and COVID-19' (2020) 48(2) *Australian Business Law Review*, 138-158, 149 and 153.

<sup>33</sup> McIntyre, Joe, Anna Olijnyk and Kieran Pender, 'Civil Courts and COVID-19: Challenges and Opportunities in Australia', *Research Paper No 2020-143*, University of Adelaide, 10.

<sup>34</sup> Legg, Michael and Song, Anthony 'Technology: The Courts and the Pandemic: The Role and Limits of Technology' (2020) (66) *LSJ: Law Society of NSW Journal*, 65-67, 66.

**d. What are the positive and/or negative effects of holding remote hearings/conferences?**

Technological resources can improve the ability to participate but also facilitate digital exclusion.<sup>35</sup> The dispensing of justice is an essential service and technology has allowed it to continue.<sup>36</sup> Courts have to consider appropriateness of remote proceedings. Appropriateness is determined by various factors such as delay, uncertainty, injustice, public interest, and time and cost effectiveness.<sup>37</sup>

Remote hearings and conferences are valuable as they can increase the efficiency of court processes. Time, costs and access can be improved by remote work as hurdles can be removed or limited.<sup>38</sup> Remote work can improve regional access to justice and facilitate parties and practitioners with various commitments, such as families and employment.<sup>39</sup>

Remote hearings and conferences present difficulties for the Court. Court etiquette or professional courtesy, client and lawyer communications, security and privacy can be detrimentally impacted by remote work.<sup>40</sup> Remote cross-examination of witnesses and unrepresented parties particularly become vulnerable and issues of fairness are raised.<sup>41</sup> It must be considered that not all circumstances are suitable for remote hearings or conferences.

**4. Remote work and judicial independence**

**Do you see any positive or negative effects of remote work on judicial independence? If yes, please give examples.**

Judicial independence is central to the legal system in Australia. It is critical that judges are and are seen to be independent and impartial. It has long been accepted that justice should be done as well as seen to be done. Open justice is an essential feature of the Australian judicial system, with constitutional underpinnings. There presently is little indication that remote work has had a negative impact on judicial independence in Australia.

**5. Limits on remote work for judges**

**a. Does your country place any limits on the remote work of judges? If yes, please give examples.**

The Court has moved to a more hybrid system that blends in-person and remote hearings together. As stated previously in this Response, the Court has adopted an approach whereby hearings are to be held in person unless the presiding judge considers that a remote hearing would be appropriate in the circumstances.

---

<sup>35</sup> McIntyre, Joe, Anna Olijnyk and Kieran Pender, 'Civil Courts and COVID-19: Challenges and Opportunities in Australia', Research Paper No 2020-143, University of Adelaide, 11.

<sup>36</sup> Legg, Michael and Song, Anthony 'Technology: The Courts and the Pandemic: The Role and Limits of Technology' (2020) (66) LSJ: Law Society of NSW Journal, 65-67, 67.

<sup>37</sup> Strong, SI, 'Procedural Law in a Time of Pandemic: Australian Courts' Response to COVID-19', Legal Studies Research Paper Series No 20/38, University of Sydney Law School, July 2020, 7-8.

<sup>38</sup> Law Society of NSW, A Fair Post-Covid Justice System: Canvassing Member Views (January 2022), 5.

<sup>39</sup> Needham, Jane SC, 'What have we learnt from enforced working from home?', (2020) (Winter) Bar News: The Journal of the NSW Bar Association, 38-40, 40.

<sup>40</sup> Law Society of NSW, A Fair Post-Covid Justice System: Canvassing Member Views (January 2022), 6.

<sup>41</sup> Law Society of NSW, A Fair Post-Covid Justice System: Canvassing Member Views (January 2022), 3.

**b. Are there any proposals to change rules or statutes in your country either or permit more, or to limit, remote work by judges?**

There is growing jurisprudence on when it is appropriate to hold virtual hearings.<sup>42</sup> It is however unknown as yet as to whether the law in Australia will undergo further changes to the status of remote work for judges.

**c. Should there be any changes of rules or statutes in your country either to permit more, or to limit, remote work for judges?**

It is the view of the Court that a hybrid system whereby judges are permitted to work remotely and be made available in person is an effective way for the Court to carry out its functions efficiently and according to the administration of justice. The benefits of the digitisation of court processes outweighs the detriments, provided hurdles, in particular those concerning open justice and accessibility, are addressed.

Her Honour Judge Caroline Kirton KC  
Federal Circuit and Family Court of Australia  
Commonwealth Law Courts  
Melbourne, Victoria, Australia

---

<sup>42</sup> McIntyre, Joe, Anna Olijnyk and Kieran Pender, 'Civil Courts and COVID-19: Challenges and Opportunities in Australia', Research Paper No 2020-143, University of Adelaide, 4.