

Human Rights and Technology

By Charles Gregory, on behalf of the NSW Bar Association Human Rights Committee

The New South Wales Bar Association recently provided comments to the Australian Human Rights Commission in response to the Commission's Discussion Paper – Human Rights and Technology. While the Commission did not call for comments relating to COVID-19, the Association thought the Commission was uniquely placed to consider the impacts of technology upon human rights through the lived experience of the pandemic. This article is a shortened and edited version of the Association's submission, focussing on the parts relating to COVID-19 and the justice system.

During a very short space of time, the pandemic has in many sectors prompted an unprecedented reliance on technology, including online platforms and videoconferencing, to ensure the continued delivery of work and services where face-to-face interaction is not possible due to Government restrictions.

This has given rise to both old and new questions concerning privacy, the rule of law, human rights, equality and accessibility, including in the context of Australia's justice system, the operations of the courts, and the role of the legal profession.

Historically, Australia's justice system has relied significantly on person-to-person interactions. These include the physical appearance of counsel in court, the physical attendance of witnesses to give evidence and undergo cross-examination, the physical presence of a jury during a trial and, in accordance with the principle of open justice and open courtrooms, the ability of members of the public and the media to attend hearings and observe justice being done.

This face-to-face interaction is important for many reasons, including as a safeguard to promote the administration of justice by promoting the sanctity of the evidence and minimising the ability of others to interfere with or influence due process or persons involved in a matter. For example, to ensure that the oral evidence of a witness is given without duress, coaching or influence from some other person present, or to ensure that a person signing a will, affidavit or other document does so of their own free will.

As barristers would well know, to respond to the developing COVID-19 pandemic, courts and tribunals have put in place measures to conduct proceedings without the need for physical attendance. Some legislative change has also been required to ensure the justice system possesses the requisite flexibility to handle alternate arrangements and continue business as best as usual.¹

Where person-to-person interactions are temporarily replaced with virtual interactions or videoconferencing, appropriate safeguards must be put in place to ensure that the purpose and the sanctity of



that interaction and the rights of individuals involved in legal matters or proceedings are not impermissibly compromised.

Where it is appropriate and in the interests of justice to do so, courts, tribunals and alternative dispute resolution practitioners have increasingly relied on online platforms such as Zoom and Microsoft Teams. The reality is, however, that these technologies were originally built for other purposes, such as facilitating collaborative teamwork in corporate settings, and their use in a litigation setting has been a stop-gap solution.

There must be continued assurances that these platforms are secure, appropriate for, and maintain the dignity of a court environment, due to the sensitive and sometimes confidential nature of trials and court proceedings. For example, when audiovisual technology is used for witnesses to give evidence, there is room for these platforms to be abused by individuals to manipulate witnesses off-camera.

A recent new measure is the *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW), which permits the witnessing of the making of certain documents, including wills, affidavits and statutory declarations, by way of audiovisual link. Providing continuity in the service of witnessing important documents is extremely important to both the community and justice system during the COVID-19 pandemic.

However, this new measure must be

balanced by careful safeguards to prevent these provisions from being abused, or from any unintended consequences, especially for already vulnerable members of the community.

Great caution must therefore be taken in relation to any changes, even if only temporary, to witnessing enduring powers of attorney, appointments of enduring guardian, and wills to ensure that safeguards against duress, coercion and undue influence are not inadvertently undermined. The law as it currently stands – for example, that particular documents be prepared or signed in person, under oath, and in the presence of witnesses – seeks to protect the vulnerable from fraud, forgery or undue pressure. These important objectives must be carefully considered, and other safeguards adapted where technology is to be used.

It is also inevitable there will be members of the community who for various reasons may not be able to access adequate technology or software in order to take advantage of the proposed altered electronic arrangements or participate in court matters via videolink. They include disadvantaged and marginalised individuals, those in rural, regional or remote areas, the elderly, those with disabilities and the homeless.

In such cases, suitable alternatives should be considered and made available to enable people to access legal services and exercise their rights as and when required, with appropriate social distancing measures.

As the relationships between communities, the justice system and technology are all changing due to COVID-19, so too are the implications that technology has on human rights and access to justice issues. It is imperative that these implications are fleshed-out and fully understood in order to ensure that individuals and communities are properly protected during this time of rapidly increasing interaction with technology. **BN**

ENDNOTES

¹ See, e.g., *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW).