

A successful recovery:  
reporting of online hearings  
of the Federal Courts

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Law Council  
OF AUSTRALIA

Due to the COVID-19 pandemic, the Federal Courts (High Court of Australia (**High Court**), Federal Court of Australia (**Federal Court**), Federal Circuit Court of Australia (**Federal Circuit Court**) and Family Court of Australia (**Family Court**)) have each put in place alternative arrangements for listings and other events that would ordinarily require in person attendance and have had to adjourn or otherwise delay certain hearings where such arrangements are not appropriate or practicable.

In many cases the conduct of matters has been adapted to make use of audio-visual link (**AVL**) or audio link technologies. The Law Council commends the Federal Courts for engaging in clear, consistent and constructive communication with the legal profession throughout this process.

As Australia moves into the COVID-19 recovery period, the Law Council will work collaboratively with the Federal Courts to identify common goals and priorities for the administration of justice that both address legacy issues and embrace opportunities to which COVID-19 has given rise. The increased use by the Courts of online hearings and of a range of additional technologies for that purpose is an example of an outcome of the COVID-19 experience that gives rise to both issues and opportunities.

The Law Council is keen to further engage with the Court on matters relating to the enhancement of the processes and procedures surrounding the use of such technologies in the future while at the same time addressing the issues for open justice and the safeguards that are necessary to protect the Court and litigants as it does so.

Against that background the Law Council has developed the following for further consideration and consultation by and between the profession and the Courts.

## **OPEN JUSTICE AND ONLINE**

### **HEARINGS: THE ISSUE**

Open justice is one of the primary attributes of a fair trial and it is a fundamental rule of the common law that the administration of justice take place in an open court. However, where the rare exceptions to open justice have been appropriately considered and applied, secrecy or suppression may be appropriate. At common law, these exceptions are premised on being 'necessary to secure the proper administration of justice'. Other exceptions are permitted by statutory provisions.

The legislation establishing the Federal Courts and the rules of each Court contain provisions that impact the principle of open justice. In the Federal Court, they include the power to make suppression orders (*Federal Court of Australia Act 1976* Part VAA, Division 2) and prohibitions on the use of recording and communications

devices in proceedings (*Federal Court Rules 2011* (Cth) (**Rules**), rule 6.11). In the Family Court and Federal Circuit Court it is an offence to publish details of proceedings or images that may identify involved parties and witnesses in family law cases (section 121 of the *Family Law Act 1975*).

The Courts have recognised that it is important to ensure that these limitations and prohibitions extend to the conduct of hearings through the use of AVL, audio link and other technologies. They are real hearings conducted by remote access.

Members of the profession have expressed concern as to compliance by some with the application of these limitations and prohibitions to online hearings. This has raised for consideration the desirability of amendments to the rules of the Federal Courts to ensure that the full range of technologies that may be involved in copying, recording or otherwise reproducing and publishing details of online court proceedings and the litigants involved (including the use and dissemination of screenshot images and soundbites from legal proceedings conducted in an online environment) is comprehensively addressed.

## **POSSIBLE REFORMS FOR CONSIDERATION**

The Law Council has raised for consideration by and consultation with the Federal Courts several areas for possible reform to better ensure that the prohibitions and limitations on the use of recording and communications devices clearly extend to online hearings and capture all potential technologies and methods of recording and publication that might be involved.

These include:

- An amendment to rule 6.11 of the Rules so that it clearly states that a hearing conducted by AVL, audio link or otherwise, in accordance with sections 47A-47E of the Federal Court of Australia Act 1976 (Cth), falls within the meaning of a hearing conducted 'in the Court' for the purposes of the Rules. The rule might also make clear that 'recording' includes the taking of screenshot images and photographs of proceedings occurring online and the recording of soundbites from online hearings.

This amendment would build upon existing recent guidance by the Federal Court and Federal Circuit Court to the effect that the use of communication or recording devices for the purpose prohibited in rule 6.11 in the case of physical courtrooms is equally prohibited in the case of online hearings held by these courts, noting that the *Federal Circuit Court Rules*

2001 (Cth) apply rule 6.11 to proceedings at the Federal Circuit Court.

- An amendment to rule 1.19 of the *Family Law Rules 2004* (Cth), which prohibits recording in a broader range of scenarios than do the Rules, in the form of clarification at rule 1.19(1) that the relevant prohibition applies where the event in question occurs in the context of a proceeding conducted by AVL, audio link or otherwise, as above, and by providing the examples of taking screenshot images and soundbites from hearings.
- An amendment to the *Court Security Act 2013* (Cth) to include taking 'screenshot' images and 'soundbites' as examples of making a recording or transmission of sound for the purposes of section 39.

## BACKGROUND

### Current rules on the recording of proceedings in the Federal Courts

Currently, unless the Federal Court exercises its discretion to dispense with compliance, a person must not use a recording device in the Federal Court (or Federal Circuit Court, which applies the same rules as the Federal Court in this regard) for the purpose of recording, or making a transcript of, the evidence or submissions in a hearing in the Court.<sup>1</sup>

A recording device must also not be used to disturb a hearing, or to allow a person who is not present in the Court to receive information about the proceeding or hearing to which the person is not entitled.<sup>2</sup>

In this context, a recording device is defined as one that is capable of being used to record images or sound, including a camera, tape recorder, video recorder, mobile telephone or digital audio recorder.<sup>3</sup>

In the case of family law proceedings in the Family Court and the Federal Circuit Court, section 121(1) of the *Family Law Act 1975* (Cth) (**Family Law Act**), additionally, restricts the publication of court proceedings. It is a punishable offence under the Family Law Act if a person publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means, any account of any proceedings, or of any part of any proceedings, under the Family Law Act that identifies:

- a party to the proceedings;
- a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate; or

- a witness in the proceedings.

A party who commits an offence is punishable, upon conviction by imprisonment for a period not exceeding one year.

The *Family Law Rules 2004* (Cth) also expressly prohibit a person from photographing or recording (by electronic or mechanical means) various events, including 'a hearing or part of a hearing' and 'a trial or part of a trial', without being requested to do so by one of a list of persons.<sup>4</sup> The things which cannot be recorded extend beyond those envisaged by rule 6.11 of the Rules, and include 'a person who is in court premises', or a conference being conducted under the Family Law Act.

In addition to the above, making a recording or transmission of sound on the premises of a Federal Court which is associated with proceedings in a court, or with an event which is associated with such proceedings, is also an offence under the *Court Security Act 2013* (Cth).<sup>5</sup> One example of 'court premises' is premises used to enable a person to appear before a court by means of facilities that enable audio and/or visual communications between persons at different places.<sup>6</sup>

### Existing guidance on online hearings and recording proceedings

Where the Court directs it, video may be used to give testimony and to make appearances and submissions in the Federal Courts.<sup>7</sup> Through the exercise of this direction and in response to the social distancing imperatives brought about in the context of the COVID-19 pandemic, hearings are, increasingly, moving to an online environment in which they are conducted via video-conferencing facilities, AVL or audio link.

In light of this trend, it is pertinent to reassess the clarity of the above prohibitions, which were drafted in an environment where hearings were typically held in-person. Remote online court environments provide unique opportunities for participants to, and observers of, a hearing to discreetly record visual and audio footage and images in ways that are not possible in physical courtrooms. For example, the Law Council has been made aware of members of the media taking screenshots of, and soundbites from, Counsel appearing in an online proceeding, for subsequent publication in news stories (and without the consent of the Court or parties). This practice exposes an opportunity to adapt guidance and legislation to crystallise the rights and responsibilities of parties to online hearings and observers alike.

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<sup>1</sup>Federal Court Rules 2011 (Cth) (Rules), rule 1.34 (with respect to the Court's discretion) and rule 6.11(3). On the application of the Rules to proceedings at the Federal Circuit Court, see Schedule 3, Part 2 to the Federal Circuit Court Rules 2001 (Cth).

<sup>2</sup>Rules, rule 6.11(4)(b)-(c).

<sup>3</sup>Rules, rule 6.11(1).

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<sup>4</sup>*Family Law Rules 2004* (Cth), subrules 1.19(1)-(2). The penalty for contravening subrule (1) is 50 penalty units.

<sup>5</sup>*Court Security Act 2013* (Cth), s 39.

<sup>6</sup>*Ibid*, s 5.

<sup>7</sup>See, Federal Court of Australia Act 1976 (Cth), ss 47A and 47F.

The 2014 Guide on [\*Mobile phones, tablets, cameras and other recording equipment in Federal Court facilities and Courtrooms\*](#) sets out the prohibition of recordings made "On Court premises" and "During a hearing", though does not specifically address online hearings. However, on 2 April 2020, the Federal Court released the [\*National Practitioners and Litigants Guide to Online Hearings and Microsoft Teams \(the Guide\)\*](#), which it updated on 1 May 2020.

As stated in the Guide, participants to an online hearing are taken to have consented to its being recorded by the Court's recording and transcription services contractor, Auscript, and through Microsoft Teams directly.<sup>8</sup> In keeping with the principles of open justice, the Guide notes that members of the public may apply to view online hearings remotely.<sup>9</sup> However, observers must not record the proceedings.<sup>10</sup> The Guide explicitly states that the prohibition on the use of devices for recording, for making a transcript or otherwise, as set out in Division 6.2 of the Rules, still applies in the case of online hearings.<sup>11</sup>

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<sup>8</sup>See cl 4.1. See, also, the decision of Perram J in *Quirk v Construction, Forestry, Maritime, Mining and Energy Union (Remote Video Conferencing)* [2020] FCA 664 at [5] - [6].

<sup>9</sup>See cl 5.1.

<sup>10</sup>See cl 5.4.

<sup>11</sup>See cl 4.1.8.