



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PuLC:CBvk100223

10 February 2023

Technology Assisted Voting review
NSW Electoral Commission
GPO Box 832
SYDNEY NSW 2001

By email: TAV.Review@elections.nsw.gov.au

Dear Commissioner,

Technology assisted voting review

Thank you for the opportunity to provide comments. The Law Society's Public Law Committee has contributed to this submission. We do not seek to answer all of the questions raised in the issues paper, but rather makes some comment on a number of specific issues within the Law Society's expertise.

Context for the review

We are aware of the decision of Beech-Jones CJ at CL in *Electoral Commissioner v Kempsey Shire Council (No 2)* [2022] NSWSC 282, following a systems failure on the day of the relevant local government elections. We are also aware of the interim determination of the NSW Electoral Commissioner of 16 March 2022 that iVote not be used at the state election of 25 March 2023 and any intervening by-elections (largely due to risks posed by the current software version in use being phased out).¹

We note that the NSW Parliament passed the *Electoral Legislation Amendment Act 2022* (NSW) which limits technology assisted voting at the State election in March 2023 to telephone voting by electors who are blind or vision impaired.

In this context, we have considered, among other issues, two particular legal issues relevant to the possible future implementation of online technology assisted voting (**online voting**). In our view, this is a pressing issue for voter enfranchisement, and insight might also be drawn from other contexts in which online voting is becoming more common place, including corporate bodies, not for profit bodies, charities and incorporated associations. Our members note that in this space, some of those organisations that have moved to online voting have seen significant increases in voter participation.

¹ Blind Citizens Australia and the New South Wales Electoral Commission joint statement, "NSW Electoral Commission commits to explore technology assisted voting options to replace iVote," 22 November 2022, online <https://elections.nsw.gov.au/about-us/media-centre/news-media-releases/nswec-commits-to-explore-tav-options>.

Disability discrimination

We are aware of the view of Blind Citizens Australia² that telephone assisted voting (as currently legislated) is not a reasonable adjustment to the voting system, as it would not enable blind and low vision voters to vote independently, secretly and verifiably. This raises the issue of direct or indirect discrimination within the meaning of s 5 and s 6 of the *Discrimination Disability Act 1992* (Cth) (**DDA**).

In this regard, we suggest that, to the extent that suitable (or adaptable) online technology is reasonably available, it should be utilised for online voting, at least for people with a disability. This should include voters who might find themselves on voting day temporarily unable to vote, for example those with a temporary medical condition. The technology should allow for the exercise of the same rights as other voters, including secrecy, except to the extent that NSW Electoral Commission (**NSWEC**) can show that providing such technology would cause it unjustifiable hardship as defined in s 11 of the DDA.

We suggest that, in order to maximise effectiveness, and minimise the risk of technology failures, the NSWEC should, to the extent practicable, implement relevant technology standards, such as the accessible technology standards recommended by the Australian Human Rights Commission.³

If online voting can be made available to people with a disability, we suggest that the NSWEC consider at a future time issues and options for allowing anyone that would otherwise find it difficult to vote for any reason (for example their proximity to a polling booth on polling day and lack of available alternatives, or a requirement to isolate for COVID-19) should also have access to online voting.

A savings provision for online voting

We acknowledge that it is unlikely that any statutory provision could address the full range of misadventure that might occur with online voting in the course of an election. However, if a form of online voting is found to be suitable in NSW, and is implemented in the future, it would be useful to consider a legislative savings provision.

In this regard, we understand that to overcome the potential for technical failure to void the May 2022 federal election, cl 7(4) of the *Commonwealth Electoral (COVID Enfranchisement) Regulations 2022* (Cth) specifies that “any failure to provide a telephone voting method does not invalidate the result of a general election, Senate election or by-election”. An equivalent savings provision, relating to the use of telephone voting at the 2023 State election by electors who are blind or have low vision, has recently been included at cl 14(6) of Part 4, Schedule 7 to the *Electoral Act 2017* (NSW) (**cl 14(6)**):

(6) An election is taken not to have failed, and the results of an election are not invalid, merely because telephone voting permitted by this clause was not available during a period when telephone voting was permitted under this clause.

Given the breadth of these provisions, the validity of these savings provisions may be open to challenge. We suggest that the risk of invalidation might perhaps be reduced in respect of a potential online voting savings provision by adding an exception at the end of an equivalent to cl 14(6), to the effect of:

² See Blind Citizens Australia, *Submission to the Technology Assisted Voting Review*, 13 January 2023, online www.bca.org.au/submissions/.

³ Australian Human Rights Commission, *Accessible technology recommendations*, <https://tech.humanrights.gov.au/accessible-technology>.

An election is taken not to have failed, and the results of an election are not invalid, merely because online voting permitted by this clause was not operable during a period when online voting was permitted under this clause, unless:

- as a result of the inoperability eligible voters were prevented from voting throughout the voting period; and
- a recount by the Electoral Commissioner has determined that an alternative result may have resulted if the eligible voters had been able to vote online throughout the voting period; and
- as a result, the result of the election was likely to be affected.

The final form of the savings provision settled upon should be capable of applying equally to Legislative Council and Legislative Assembly elections. Further, while this would be an administrative decision, the Court of Disputed Returns seems to be the most appropriate forum to challenge an order to re-run an election (or a failure to make such an order).

Thank you for the opportunity to provide comments. Questions at first instance may be addressed to Vicky Kuek, Principal Policy Lawyer, at victoria.kuek@lawsociety.com.au or 9926 0354.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'CBanks', written in a cursive style.

Cassandra Banks
President