AUSTRALIAN COURTS

HOW A GLOBAL PANDEMIC BUILT OUR LAUNCHPAD INTO THE FUTURE

GRATA FUND

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ABOUT GRATA FUND

Grata Fund supports people and communities to advocate for their legal rights. We do this by removing the financial barriers that prevent test cases in the public interest from getting to court and by providing legal and campaign strategy expertise. We advocate for a fairer and more open democracy where all voices, including the most vulnerable can be heard so we can build a fairer, kinder world. Our areas of focus are democracy, human rights and climate change. For further information about Grata Fund visit www.gratafund.org.au.

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EXECUTIVE SUMMARY

Australia is facing an unprecedented health crisis with the COVID-19 pandemic, with ripple effects on the justice system. In response, the courts have worked incredibly hard to ensure that the wheels of justice keep turning. We've seen innovation and a remarkable shift to digital operations in the courts that was unimaginable just a few months ago, with judicial officers, legal practitioners and court users adapting to virtual hearings at a rapid pace.

Governments at the federal, state and territory level have rushed through legislation and regulations in response to COVID-19 that impact on the operation of the courts. The courts are now compelled to abide by social distancing restrictions, which has rendered new jury trials impractical, led to matters being adjourned , and forced hearings to shift online.

While the courts should be commended for adapting so quickly, concerns about the shift to digital operations remain. What impact will digital operations have on the cornerstones of our justice system, including access to justice, open justice, procedural fairness and the right to trial by jury? The courts play a vital role in our democracy and the rule of law. As the third arm of government, The courts provide us all with the ability to hold the powerful, including governments and corporations, accountable under the law.

The effective administration of justice is dependent on public trust in the justice system. Public participation and open court processes must be maintained in order to ensure public confidence in our courts. We need to put safeguards in place to allow our courts to continue operating, and to ensure public trust in the judiciary and the courts remains while justice is shifted online.

Once the pandemic passes, the courts will be in a position to evaluate where technology has increased efficiency, access to justice and open justice. This evaluation should be done in close consultation with affected people, their representative bodies, parties, and legal practitioners. Consideration should be given to entrenching the digital progress made by the courts where it facilitates the fair, efficient and effective administration of justice. Governments need to adequately resource the courts and the legal assistance sector to ensure the most disadvantaged in our community benefit from online courts.

This report makes 17 recommendations to safeguard our courts and their key democratic role, and to ensure they are properly resourced to embrace digital operations on a permanent basis where appropriate.

2. SUMMARY OF RECOMMENDATIONS

1 Federal, state and territory governments should work with the technology and communications industry to provide free digital literacy programs and programs for free or low-cost access to the internet and computers for people who are socially, economically and geographically disadvantaged to enable participation in virtual hearings.

2 Federal, state and territory governments should provide additional resourcing to the courts for the development and delivery of training sessions on how to engage with virtual hearings. The courts should have specialised online assistants to support self-represented litigants to engage in court processes online.

3 Courts should update their rules and privacy policies on the handling and storage of case files as courts transition online, to protect the sensitive personal information of court users.

4 Federal government should consider developing a centralised state-managed platform for cloud file and document storage solutions for the courts.
The Federal, State and Territory governments should provide increased resourcing to legal assistance services to ensure they can manage the increased need for legal advice and representation caused by COVID-19.

5 Federal, state and territory governments must adequately resource courts and tribunals to enable them to invest in appropriate technologies to facilitate digital operations.

6 Federal, state and territory governments should resource the courts to conduct research on the viabilities of online platforms for virtual hearings, and how to best mitigate access to justice, accessibility, open justice and procedural fairness concerns. This research should include consultation with affected people and communities, judicial officers, court staff, legal practitioners, and court users.

7 Courts should develop guidelines for which matters are appropriate for entirely virtual hearings post-COVID-19 with the consent of the parties, taking into consideration factors such as accessibility; geographical location of the legal practitioners, parties and witnesses; access to technology; digital literacy; the complexity of the matter; the area of law; and the anticipated length of hearing.

8 Federal, state and territory governments should urgently increase funding to the legal assistance sector, including Community Legal Centres, Aboriginal and Torres Strait Islander Legal Services, Family Violence Prevention Legal Services and Legal Aid Commissions. The increase should include an immediate injection of a minimum of $200 million in additional funding per annum.

9 Federal, state and territory governments should work with the courts to develop a digital operations strategy to cement beneficial digital progress made by the courts during COVID-19 pandemic. The strategy should ensure that the use of technology in the courts enhances access to justice, open justice, and procedural fairness, and promotes equality before the law.

2. SUMMARY OF RECOMMENDATIONS

10 To facilitate open justice, the courts should, where appropriate:
   a) Facilitate physical attendance by the public and the press to courtrooms in accordance with social distancing requirements; and
   b) Facilitate online attendance by the public and the press to virtual hearings, including through making hearings available through live streaming, including when the pandemic passes.

11 To ensure an appropriate balance between procedural fairness to parties and the efficient administration of justice, the courts should develop guidelines for judges when assessing applications for adjournments due to COVID-19. The guidelines should:
   a) Specify that applications are to be determined objectively on a case by case basis, having regard to the nature of the proceedings.
   b) Specify that if judges refuse an application for adjournment, they must proactively adjourn the trial once it becomes apparent to them that procedural fairness is being negatively impacted on.

12 Federal, state and territory governments should commission a full review of the resourcing needs of the judicial system, and properly resource the courts to enable them to clear existing backlogs and fulfil their function of hearing disputes in a timely manner. This should be accompanied by minimising delays in judicial appointments and increasing judicial appointments where required to deal with increased caseloads.

13 State and territory governments must ensure that accused persons receive legal advice about their right to a trial by jury and the risks of judge-alone trials prior to waiving their right to trial by jury.

14 State and territory governments should make new jury trials available immediately after social distancing rules are relaxed to ensure the right to trial by jury is available, and to allow citizens to perform the vital democratic function of jury service.

15 The ACT Government should immediately repeal section 68BA of the Supreme Court Act 1933 (ACT)that provides for judge-alone trials without the accused's consent.

16 The Federal Government should properly resource the Family Court and Federal Circuit Court in order to enable the efficient administration of justice.

17 The Family Court and Federal Circuit Court should consider making virtual hearings available on an ongoing basis for family law matters where safety is a concern. The federal government should adequately resource the Family Court and Federal Circuit Court to enable this.

3. INTRODUCTION

> "Central to respect for the courts is that they adhere, and are seen to adhere, to the essentials of judicial power. Those essentials are independence, open justice and procedural fairness. Provided online hearings do not detract from those essentials then public trust in the courts will continue." Michael Legg, Professor in the Faculty of Law, UNSW (1).

The courts are central to the rule of law and access to justice in Australia. Courts play a crucial role in adjudicating cases where there is a question as to whether the government has acted lawfully. Access to the courts is an important way in which Australians are able to seek justice for wrongs not only done to themselves, but also to hold corporations and governments legally accountable for their actions and decisions.

Courts are a key pillar of our democracy, and during the COVID-19 crisis, the courts have continued to operate and perform their essential role of facilitating the administration of justice. As noted by Justice Perram of the Federal Court when he declined to adjourn a 6 week hearing in response to COVID-19:

> "It is not feasible nor consistent with the overarching concerns of the administration of justice to stop the work of the courts for such a period. Nor is it healthy for the economy. A prolonged cessation of business will be very poor outcome. Those who can carry on should, in my view, do their best to carry on as inconvenient and tedious as this is going to be."(2)

COVID-19 has seen a rapid and unprecedented shift to online operations by courts and tribunals across all jurisdictions in Australia. This digital uptake covers online filing, online registries, document management, communication, increased use of audio-visual links and the use of online platforms such as Microsoft Teams and Cisco WebEx for hearings. Appendix A of this report catalogues how the High Court, Federal Court, Family Courts and Supreme Courts are operating in response to COVID-19.

While we welcome digital progress in the courts, the key pillars of our justice system need to be safeguarded during this transition. The report identifies key opportunities and challenges precipitated by the shift to online courts.

Section 4 discusses the opportunities and barriers caused by technology in the justice system. We cover how virtual hearings are working in practice, the need for the courts to be properly resourced to use technology, the possible cost savings and the potential of technology to increase access to justice. The need to entrench the digital progress made by the courts after the crisis passes is also detailed.

Section 5 details the access to justice problem in Australia, covering access to the courts, access to legal assistance and the additional barriers to access to justice faced by marginalised groups such as First Nations People, people with disability and people from a culturally and linguistically diverse background when engaging with online courts. We discuss how digital exclusion can increase barriers to access to justice, and what needs to be done to facilitate access to justice in a digital world.

Section 6 discusses the principle of open justice in Australia, and current issues with online courts that threaten open justice, including exclusion of the public and the press from physical courtrooms due to social distancing restrictions. We discuss how the courts should maintain open justice while operating online, and how technology may be used to increase open justice, making courtrooms more available so we can witness justice being done.

Section 7 discusses the importance of procedural fairness to the rule of law and our justice system. We cover the challenges posed by the transition to online courts, and how procedural fairness can be maintained in court processes. We also discuss how the pandemic is compounding pre-existing delays in the justice system, with many courts adjourning matters. Delays in the court system must be mitigated by increased resourcing for the courts to allow them to efficiently resolve disputes.

Section 8 details how the right to a fair trial is being endangered in criminal trials in 5 states and territories, where new jury trials are not being listed, leaving people on remand facing extended delays unless they opt for judge-alone trials. We cover what this means for the right to trial by jury in Australia.

Section 9 discusses the increase in family and domestic violence in Australia during the pandemic, and the establishment of a COVID-19 list to deal with urgent matters in the family courts. The benefits of online hearings where safety is a concern for the parties are explored.

The report concludes by emphasising the importance of the courts in our democracy, and public trust in the court system. We need to put safeguards in place to allow our courts to continue operating, and to ensure public trust in the judiciary and the courts remains while justice is shifted online. Once the crisis passes, the digital progress made by the courts during COVID-19 provides an opportunity for the justice system to adopt greater use of technology, where the use of this technology increases efficiency in court processes, access to justice, open justice and procedural fairness. Any permanent shift to online operations in the courts must be implemented only after genuine consultation with affected groups, and promote and maintain the vital role of the courts in the rule of law.

4. TECHNOLOGY IN THE COURTS

The use of technology in the courts has been upscaled at a rapid pace in response to COVID-19. The pandemic has catalysed drastic innovation in technology for the courts. While this has allowed for digital progress, there is a need for this digital progress to be properly monitored, including through evaluation, consultation, feedback and consideration of broader impacts on justice principles.

Unlike some overseas jurisdictions, such as Canada and the United Kingdom, Australian courts have traditionally been slower to embrace technology and engage in online dispute resolution. While technological improvements such as e-filing and electronic case management have been available for several years across the Federal Court and some Supreme Courts, prior to COVID-19 virtual hearings had been piloted but not rolled out across courts in Australia. For example, the Online Court of the Local Court of NSW enabled procedural and interlocutory matters to be conducted online; and the Federal Court eCourtroom was used for case management activities such as settling costs, but no full virtual hearings were held.

In 2019, Chief Justice Allsop of the Federal Court wrote, "the Federal Court does not at present have any plans to roll out digital hearings as a default position, but there is scope to introduce the option of having some digital hearings"(3). However, once confronted with COVID-19, Australian courts, led by the Federal Court, have quickly adapted in response to

COVID-19. For example, the High Court held its first full virtual hearing in Cumberland v The Queen on 15 April 2020;(4) and the Federal Court has held multiple online hearings since shifting to online operations.

4.1 DIGITAL EXCLUSION

Digital exclusion poses barriers for access to justice and equality before the law as courts transition to digital operations. Digital exclusion occurs when someone cannot access or afford the ability to connect to the internet and effectively use online technologies.

The Australian Digital Inclusion Index estimates that 2.5 million Australians are not online. Australians with lower levels of income, education and employment are significantly less digitally included.(5) In 2016-17, 14% of Australian households did not have access to the internet at home.(6) 23% of households in remote or very remote locations in Australia did not have access to the internet.(7) Only 55% of people aged over 65 are internet users.(8) First Nations People have lower access to the internet at home, with affordability being a key barrier, and this is compounded for First Nations People in remote areas.(9)

National Aboriginal and Torres Strait Islander Legal Services notes the difficulties caused by the shift to online operations in the courts for First Nations People:

> "[Aboriginal and Torres Strait Islander Legal Services] are reporting that people are also struggling with technology either from lack of knowledge about how to use it, because they don't have access to equipment or because they don't have connectivity. This further compounds people's anxiety and stress."(10)

Dianne Anagnos, Principal Solicitor of Kingsford Legal Centre highlighted the effect of digital exclusion on the provision of legal advice:

> "Digital exclusion and digital literacy are a big problem for many of our clients, particularly some older people, people with disability and homeless people. This means it's difficult for these clients to provide us the documents we need by email to provide legal advice. It means providing accurate advice is more difficult without the documents, and advising these clients takes longer as we have to ask third parties to provide the documents."(11)

Professor Michael Legg of UNSW Law details the limits of technology, particularly for self-represented litigants:

> "...I think we have also learnt that technology is not some easy fix for the court system. Indeed many of the problems experienced with online hearings arose because court users did not have the necessary equipment or bandwidth to be able to properly engage in the hearing. There remains a concern that self-represented litigants trying to participate in a hearing from the suburbs or a regional area will be impacted by the digital divide. Equally the demand put on telecommunications infrastructure during the pandemic may have been far greater than would usually be the case."(12)

Pip Davis, Principal Solicitor of Women's Legal Service NSW reports of the difficulties faced by clients trying to sign affidavits:

> "Most of our clients don't have a computer, printer and a scanner, so even though provisions have been made to enable a lawyer to witness someone signing an affidavit via video, it still requires technology, a printer and a scanner and many clients don't have access to these things, particularly during a pandemic where they could usually go to a library or elsewhere to access such things."(13)

The barriers to access to justice faced by marginalised groups have been exacerbated by the shift to digital operations in response to COVID-19. For example:

- First Nations Peoples, who face higher numbers of legal problems are unlikely to have access to the level of legal assistance, support, interpreters and technology required to successfully engage with online courts;
- Self-represented litigants may face greater difficulties in participating effectively in the court process due to unfamiliarity with the online platforms being used, or a lack of access to technology and the internet;
- People in rural, regional and remote areas are more likely to be digitally excluded, have poor internet connections and face difficulties accessing legal assistance;
- People with disability may face additional difficulties with online platforms that do not support their accessibility needs;
- People from culturally and linguistically diverse backgrounds may face difficulties interacting with their interpreters who are not in the same room as them.

> The Federal Court acknowledges that unrepresented litigants who are unfamiliar with the court's processes will have different needs, which the court should consider where appropriate. The barriers posed to accessibility by online platforms must be mitigated to ensure self-represented litigants, people with disability, people who need interpreters, and other marginalised groups can participate fully in court procedures.

As noted by Professor Michael Legg:

> "There ... [need] to be facilities to help self-represented litigants. Some commentators seem to think that litigants will work it out or can get help from a family member. But this should be a role the courts take on through specialised online assistants. In time they may be able to use chatbots and the like to assist, but I think you need user-centric instructions supported by an appropriate trained person."(15)

Recommendations

1. Federal, state and territory governments should work with the technology and communications industry to provide free digital literacy programs; and programs for free or low-cost access to the internet and computers for people who are socially, economically and geographically disadvantaged to enable participation in virtual hearings.

2. Federal, state and territory governments should provide additional resourcing to the courts for the development and delivery of training sessions on how to engage with virtual hearings. The courts should have specialised online assistants to support self-represented litigants to engage in court processes online.

4.2 VIRTUAL HEARINGS IN PRACTICE

Judges, the legal profession, and parties are experiencing virtual justice for the first time in Australia. Experiences of online courts have been mixed.

Barrister Dr Peter Cashman recently appeared at the settlement approval hearing for the Volkswagen diesel-gate class action litigation in the Federal Court. He commented positively on the online hearing experience:

> "In the case of the VW hearing in the Federal Court I thought the Microsoft Teams program worked extremely well. All counsel who appeared, along with several objectors to the proposed settlement, were able to articulate their positions clearly and the visual impact was very good. In many respects, the oral and visual perception was better than in open court. The presiding Judge, Justice Foster, sat in the Federal

> Court but all other participants appeared electronically. In my view, the acoustics and visuals were better than is often the case in open court."(16)

Pip Davis of Women's Legal Service NSW details the challenges of online courts:

> "We've also experienced lots of challenges with the shifting of court services online. Technology and connections have proved to be inherently unreliable; this has included for us as a service, other legal service providers, the courts and for our clients. Many of our clients don't have the technology and / or data to participate in proceedings and even where they do, we have found that our clients have been largely excluded from proceedings quite simply because of the technology demands and difficulties in the numbers of parties needing to attend a court event (for example) remotely."(17)

Legal commentator Richard Ackland detailed a Sydney barrister's experience of appearing in a virtual hearing at the Supreme Court of NSW:

> "The judge couldn't see anyone; lines dropped out regularly; witnesses didn't know where to go; ... subpoenaed material could not be accessed by anyone; feedback [from computers] made it impossible to proceed."(18)

Solicitor Fiona McLay commented favourably on a recent virtual hearing experience:

> "I was part of a four day hearing held using Microsoft Teams and I was impressed at how well it worked. Everyone was new to the process but all were able to participate effectively. The witnesses and participants were located across four states but no one needed to travel - a huge reduction in cost and disruption. There were some intermittent connectivity issues but they were manageable."(19)

In other matters, technology has failed, resulting in adjournments being granted. For example, on 6 April 2020, Justice Fullerton of the Supreme Court of NSW adjourned the criminal trial of Eddie Obeid, Moses Obeid and Ian McDonald following a test run of the Court's audio-visual link facility. Difficulties with the technology included lines dropping out during the hearing, a court book exceeding 7,500 pages, and the system being overloaded due to the appearance of 6 counsel and solicitors.(20) Justice Fullerton stated:

> "The accused are entitled to a fair trial which includes, necessarily, fair process and procedures. I am of the view that a trial of the accused in a virtual courtroom is impractical. I have further resolved to the view that the accused's right to a fair trial

would be at risk were I to order that it continue at this time..."(21)

Despite the promise of cheaper, quicker and more open justice, concerns around protecting privacy, data storage and security have been repeatedly cited as key barriers to the adoption of online platforms in dispute resolution (22), and in other legal proceedings (23). Many case files contain sensitive personal information, including personal and identifying information, medical records, psychological reports, criminal records, employment records, intimate family information, and financial information. Some areas of law, such as family law, criminal proceedings and bankruptcy proceedings include sensitive personal information.

4.3 PRIVACY

Despite the promise of cheaper, quicker and more open justice, concerns around protecting privacy, data storage and security have been repeatedly cited as key barriers to the adoption of online platforms in dispute resolution (22), and in other legal proceedings (23). Many case files contain sensitive personal information, including personal and identifying information, medical records, psychological reports, criminal records, employment records, intimate family information, and financial information. Some areas of law, such as family law, criminal proceedings and bankruptcy proceedings include sensitive personal information.

The Victorian Government's Law Reform Committee report into the use of technology in law identifies three main issues in relation to the security and privacy of electronically stored and transmitted information:

1. To ensure that a person who purports to electronically sign and/or lodge a document is in fact the person who signed and/or lodged the document
2. To ensure that the document sent by a person is received and stored in the same form in which it was sent
3. To prevent unauthorised access to documents during transmission and once stored (24)

In the absence of a centralised state managed platform, private companies such as Dropbox, Windows and Google (Alphabet) have expanded to fill the market for cloud file and document storage solutions. The servers storing this data are often located in the US, and the private international law avenues for relief are complex. At present, the

Telecommunications International Production Orders Bill 2020 (Cth) proposes to allow Australian agencies, such as law enforcement and national security agencies, to access data stored in US cloud-based servers, and similarly allow foreign government agencies access to data stored in Australia (25). This Bill may put sensitive and confidential information at risk of being compromised and used by government agencies in the course of their investigations, where this information is stored on several of the services potentially utilised throughout the court process.

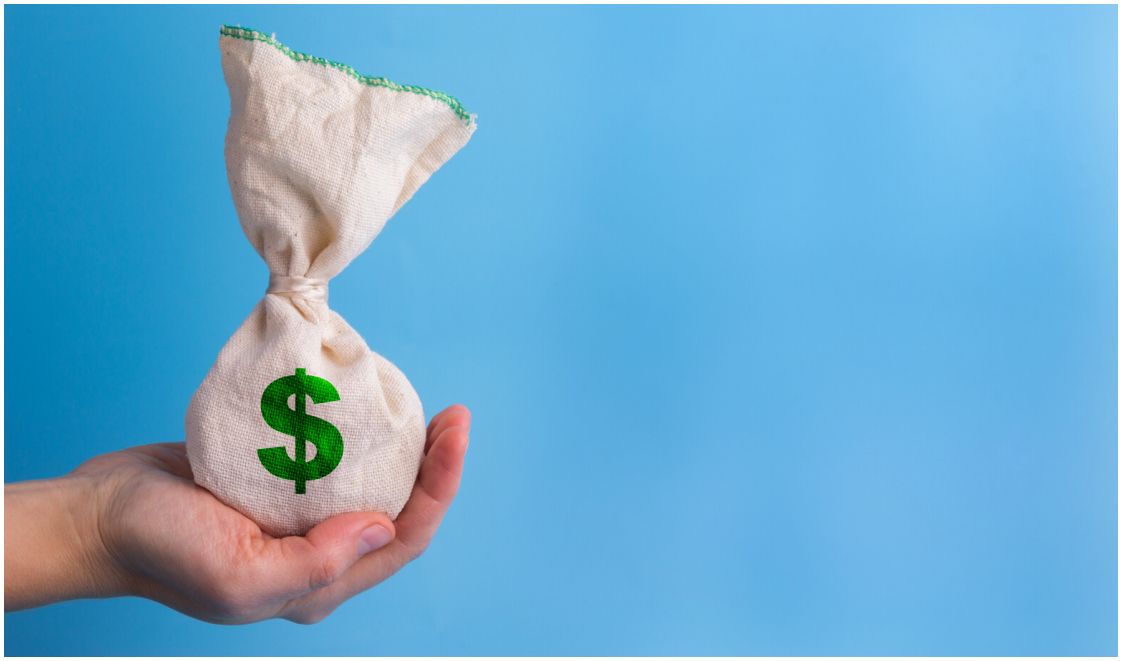
Private technology companies who may be engaged in the process of court proceedings pose serious privacy and security risks, such as through large scale data collection and privacy breaches. For example, in March 2020, the Office of the Australian Information Commissioner (OAIC) commenced proceedings against Facebook in the Federal Court of Australia for alleged breaches of the Privacy Act 1988 (26). The proceedings involve the personal data of around 311,127 Australians, for an alleged breach that occurred between March 2014 and May 2015 in relation to the Cambridge Analytica scandal that involved the illegal use of personal data for political profiling purposes (27). Modern technology has allowed prolific misuse of private information, and recourse for victims may only be available many years following the breach, if at all.

As courts move online, the protection of the privacy and personal data of court users, including parties and witnesses, particularly in sensitive matters, needs to be protected. Where documents are stored on servers located overseas, the courts should take all reasonable steps to ensure these overseas companies are complying with the Australian Privacy Principles where applicable. The courts have privacy policies and rules to deal with public, police and party access to court records. These rules and policies need to be amended to deal with new privacy issues as the courts move online. While we need sufficient safeguards in place to protect proper handling of personal information as the courts transition online, the principle of open justice also needs to be considered in providing access to court records for legitimate purposes such as research.

Recommendations

3. Courts should update their rules and privacy policies on the handling and storage of case files as courts transition online, to protect the sensitive personal information of court users.

4. Federal Government should consider developing a centralised state-managed platform for cloud file and document storage solutions for the courts.



4.4 RESOURCING THE COURTS AND POTENTIAL COST SAVINGS

In its Access to Justice Arrangements report, the Productivity Commission found that:

> "investment in information technology has been uneven across jurisdictions and that the availability, quality and use of technology varies widely. The Commission considers that greater investment in technology is warranted given the potential benefits. A lack of resources appears to be the main barrier to the uptake of technology."(28)

Despite the lack of investment in technology in the courts prior to the pandemic, there is great potential for digital operations in the courts to result in cost savings for the justice system and parties to litigation. Barrister Dr Peter Cashman argues that "the use of technology for hearings, and the use of technology in civil litigation generally, has the potential to substantially decrease the costs of civil litigation." (29)

For example, electronic filing and document management not only reduce prohibitively expensive printing costs, they also provide efficiency and convenience for litigants and their representatives to interact with the courts, and arguably ease the process of self-representation (30). While the availability and take-up of electronic filing technologies varied across jurisdictions before COVID-19 (31), the courts in Australia have now made arrangements for most files and documents to be filed electronically. It would be beneficial for the courts to uniformly maintain this technological uptake even after the pandemic passes.

Virtual or remote hearings through telephone or video-link conferences can also greatly reduce costs and increase accessibility to the justice system. Not only can courts utilise this technology at a relatively low cost, remote hearings can also obviate the need for litigants to physically attend court, thereby significantly reducing the costs of travel and the costs of conducting proceedings (32). This enhances the ability of people to access court services, especially for those in regional areas (33). To reduce costs and increase access to justice, courts should explore long-term opportunities to implement online hearings for low value or non-contentious matters, or for directions hearings.

Recommendations

5. Federal, state and territory governments must adequately resource courts and tribunals to enable them to invest in appropriate technologies to facilitate digital operations.

4.5 LOCKING IN DIGITAL PROCESSES

COVID-19 has seen courts engage in digital operations at breakneck speed. Online courts, where properly designed and evaluated, have the opportunity to enhance access to justice, open justice and create efficiency. The Hon Marcia Neave AO states:

> "The transition to online courts has the potential to make justice more accessible. The question is whether any of the digital developments made during this period will be continued, or whether the courts will return to business as usual." (34)

COVID-19 has pushed courts to use technology to facilitate the efficient administration of justice. For example, Chief Justice David Price of the District Court of NSW has stated that 40 District Court rooms can now hear cases remotely, and technology means witnesses could give evidence remotely in appropriate cases, and lawyers can avoid coming to court for short matters, reducing congestion in busy courts and litigation costs (35). Justice Price notes, "Before the pandemic, our expectation was that these improvements would be progressed gradually over a number of years." (36)

> Professor Michael Legg of UNSW Law states, "The technology and procedures to permit online hearings should be more fully developed or adopted. Online hearings offer many advantages that can reduce cost and delay. They can also improve accessibility, including for those suffering disabilities."(37)

Post-pandemic, it will be necessary for courts, government and the legal profession to assess what has worked well in the shift to online operations, what needs to be improved, and what technology needs to be abandoned. Professor Michael Legg notes:

> "We are still learning when online hearings should be used. One of the positives that could come out of the pandemic for the courts is that they can learn from the experience with technology. But they need to make sure that they don't just look inwards for the lessons to be learnt. They need to consult with the profession, but most importantly they need to hear from parties and witnesses, and from those in the criminal justice system." (38)

Consideration will need to be given to what types of disputes are best-suited to online hearings, such as less complex civil and family law matters, and which types of disputes require in-person hearings, such as complex commercial disputes and criminal trials. Barrister Dr Peter Cashman notes:

> "In my view considerably more use should be made of digital technology for online hearings, particularly for case management and directions hearings. Where oral evidence is to be given by witnesses at a final hearing, particularly in respect of contentious issues where questions of credit may arise, there will continue to be a need for some parts of hearings to be conducted in court with the witnesses physically present." (39)

Professor Michael Legg comments:

> "Going forward online hearings are more likely to be used for low value or less controversial matters, and for directions hearings. I think that fully online trials for more complex matters are not the way of the future, even if they are sufficient during the pandemic. Rather I expect trials to be conducted face-to-face in a court room but with technology facilitating the attendance of witnesses for whom a physical appearance is problematic or not essential. Technology already exists for real-time transcripts and the sharing of documents. This technology needs to be readily available." (40)

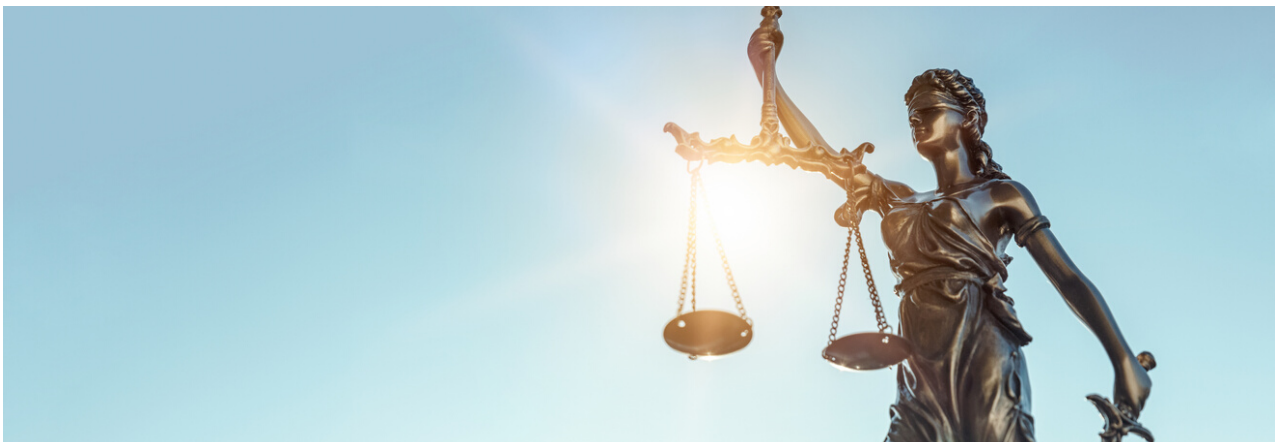
It is vital that beneficial digital progress made by the courts during COVID-19 is maintained.

Recommendations

6. Federal, state and territory governments should resource the courts to conduct research on the viabilities of online platforms for virtual hearings, and how to best mitigate access to justice, accessibility, open justice and procedural fairness concerns. This research should include consultation with affected people and communities, judicial officers, court staff, legal practitioners, and court users.

7. Courts should develop guidelines for which matters are appropriate for entirely virtual hearings post-COVID-19 with the consent of the parties, taking into consideration factors such as accessibility; geographical location of the legal practitioners, parties and witnesses; access to technology; digital literacy; the complexity of the matter; the area of law; and the anticipated length of hearing.

5. ACCESS TO JUSTICE



Access to justice is vital to the rule of law and to our democracy - inequalities in the justice system undermine the ability of Australians to participate fully in our democratic institutions, including the courts. Access to justice aims to give everyone the ability to enforce their legal rights against infringement by government, corporations and other individuals. Access to justice should not be dependent on the ability to pay for legal representation. Access to justice encompasses:

- People having equal access to legal information, advice, and representation
- People having equal access to courts and tribunals, and alternative dispute resolution.

Unfortunately, access to justice remains out of reach of many marginalised individuals and communities in Australia, due to high levels of unmet legal need. The most recent Law and Justice Foundation LAW Survey, which mapped legal need across Australia found:

- Legal problems are widespread, with over 50% of survey respondents experiencing a legal problem in the 12 months prior to interview, and 22% of respondents experiencing three or more legal problems
- People from disadvantaged groups, including First Nations People, people with disability, single parents and the unemployed are particularly vulnerable to legal problems: 65% of legal problems were experienced by only 9% of the respondents to the survey
- Approximately one quarter of the population experiences a substantial legal problem each year
- A legal professional was consulted for only 16% of all legal problems. (41)

5.1 EQUAL ACCESS TO THE COURTS

While the majority of disputes are resolved prior to matters reaching court (it is estimated that only approximately 3% of legal problems are finalised via formal legal proceedings in a court or tribunal) (42), courts play a pivotal role in access to justice. Courts provide an open forum for people in our community to have their disputes heard and resolved. The courts have a key role in access to justice through ensuring the court system is fair, accessible, affordable, and efficient. Court accessibility is vital for access to justice. Some groups of people face additional barriers to accessing justice, including First Nations People, people with disability, people in regional, rural and remote areas and people from culturally and linguistically diverse backgrounds.

First Nations People are more likely to experience multiple legal issues, due to the legacy of marginalisation, over-policing and discriminatory laws. First Nations People face numerous barriers to accessing the courts, including:

- lack of First Nations language interpreters
- high caseloads in regional, rural and remote areas that is exacerbated by fewer circuit courts operating, long waits for matters to be listed and irregular court sittings
- lack of specialist courts, including drug courts and Koori Courts in regional, rural and remote areas.(43)

For people with disability, lack of physical accessibility and accessible technology is a serious barrier to access to justice. Queensland Advocacy Incorporated notes that:

> "[m]any aspects of the courtroom process can be inaccessible or otherwise problematic for persons with disability, perhaps compounding the pre-existing disadvantage with which they come to court, further diminishing their prospects for access to justice."(44)

People living in regional, rural and remote areas experience a range of barriers to court, including cost, distance, digital exclusion, and a shortage of legal representatives. This is compounded by a decline in local court circuit services in regional, rural and remote areas, leading to extensive delays in matters being heard.(45)

People from a culturally and linguistically diverse background also face barriers to accessing the courts, including limited legal literacy, high rates of legal problems such as employment, family violence and consumer issues, not knowing where to go for help, and language barriers.

The courts need to ensure courtrooms and court processes are accessible to everyone.

5.2 ACCESS TO FREE LEGAL ASSISTANCE

The availability of free legal assistance is also vital for access to justice. The under resourcing of legal assistance services impacts upon court resources and delays. Self-represented litigants who are unable to access free legal advice cause enormous strain on the court system.

Legal assistance services remain significantly underfunded in Australia, causing ripple effects in escalating legal problems and delays in the court system. In 2014, the Productivity Commission recommended that the Government immediately provide increased funding of $200 million per year to legal assistance service in order to meet legal need (46). In 2018, the Law Council of Australia Justice Project recommended that the Government increase funding to legal assistance services by a minimum of $390 million per year (47). Both these recommendations have not been implemented by the Government.

COVID-19 has caused increased legal need, causing concern for legal services that are already operating beyond capacity and can no longer provide face-to-face or outreach services.

Nassim Arrage, Chief Executive of Community Law Australia, the peak body for community legal centres, reports that COVID-19 has created an increased demand for legal services, with the number of legal services delivered remotely by CLCs, including by telephone increasing by 30% (48). The sector "is anticipating a spike in demand for legal services after COVID-19 restrictions are lifted and people focus on more than just their immediate survival needs", including for Aboriginal and Torres Strait Islander communities, women and girls, refugee communities, older persons and persons with disability (49). Mr Arrage notes that "services that ultimately relate to disadvantage, inequity and discrimination will also be in high demand: tenancy, social security, employment, domestic and family violence, parenting arrangements, legal services for children and young people, insurance, and credit and debt. We expect these issues to continue to increase over the coming months and even after restrictions are lifted." (50)

People who already face barriers to accessing legal advice may now face additional barriers to accessing services online or over the phone. National Aboriginal and Torres Strait Islander Legal Services reports:

> "Our ATSILS members are reporting that clients are highly stressed and overwhelmed with the lack of face to face services and with the lack of accessible communication about changes to procedures." (51)

Pip Davis, Principal Solicitor of Women's Legal Service NSW reports:

> "WLS NSW has in fact seen a 30% increase in advice activities for the same period last year, with many of these advices being related to or arising out of the COVID circumstances. What we worry about though is that we are not able to reach those clients who otherwise would only ever be able to safely access us for face to face advice and that those clients are the ones who are at increased risk because they are not able to access telephone based services and so are falling through the cracks." (52)

Dianne Anagnos, Principal Solicitor of Kingsford Legal Centre states:

> "Some of our clients living with disability are having trouble accessing legal advice as we can't see them face to face as we normally would. We've had clients with hearing impairments and elderly clients struggling with receiving advice over the phone." (53)

In positive news, on 5 May 2020, the Federal Government announced it will provide an additional $63.3 million to the legal assistance sector, including $49.8 million for frontline legal services, and $13.5 million for IT costs to support the sector's transition to delivering assistance online (54). However, this funding is not sufficient to meet pre-existing legal need, let alone increased legal need as a result of COVID-19, and fails to meet the Productivity Commission's recommended funding of an additional $200 million per year. Mr Arrage welcomes the funding, but says "it is important to recognisethat the community legal sector is already coming from a basis of being under-resourced. We expect that this total amount could easily be absorbed by the community legal sector alone in COVID-19 response within the next 12 months and would encourage an ongoing review of the funding and outstanding needs to meet unmet legal needs. Our advocacy to the Federal Government is that CLCs need $56.7 million for the next 12 months."(55)

Recommendations

8. Federal, state and territory governments should urgently increase funding to the legal assistance sector, including Community Legal Centres, Aboriginal and Torres Strait Islander Legal Services, Family Violence Prevention Legal Services and Legal Aid Commissions. The increase should include an immediate injection of a minimum of $200 million in additional funding per annum.

5.3 CAN TECHNOLOGY INCREASE ACCESS TO JUSTICE?

A shift to digital operations in the courts is an opportunity to generate efficiency, cost savings, and increased access to justice. As noted by Richard Susskind, technology may assist in solving the access to justice problem (56). Dr Peter Cashman states that the transition to online courts "has the potential to make civil courts more accessible and civil litigation less expensive and protracted"(57). Professor Michael Legg of UNSW Law notes the potential of technology for increasing access to justice:

> "The current transition in the face of the COVID-19 pandemic has been more about keeping the justice system afloat rather than steaming into new waters. However, the experience will hopefully open up new possibilities for improving access to justice in the future." (58)

For example, people in regional, rural and remote areas may find it more practicable and affordable to attend virtual hearings rather than travelling to a physical courtroom hundreds of kilometres away. People with disability may find it easier to participate in litigation if their accessibility needs are met by technology. Individuals may face lower legal costs as they won't have to pay for their lawyer's time and travel costs to and from court.

5.3 CAN TECHNOLOGY INCREASE ACCESS TO JUSTICE?

Any permanent shift to digital hearings following the COVID-19 pandemic must have access to justice considerations at its centre, to ensure that the use of technology by courts enhances, rather than endangers access to justice and provides for equality before the law.

Technology should be accessible and easy to use. Professor Michael Legg suggests:

> "Consistency of technology choice and procedure would be a positive step forward, so that users are not having to work out a new app each time they go to court and be wondering how the hearing will proceed. Courts have started to provide guidance around this. For example the Federal Court of Australia has introduced the "National Practitioners/Litigants Guide to Virtual Hearings and MS Teams". (59)

The institutional legitimacy and authority of the courts also needs to be safeguarded in the transition to online operations. One primary way to protect the courts' legitimacy is through selecting which matters are appropriate for online hearings. Professor Michael Legg states:

> "Another concern is that online hearings can detract from the authority of the courts. For some matters, such as serious criminal cases, you cannot move online because you want the accused, victims and society to understand that it is an independent arm of democratic government that is deciding the case. There needs to be gravitas. It is not a video game or reality TV." (60)

Where it is appropriate to proceed through online hearings, the legitimacy of the courts must be upheld by adapting the usualformalities to the new medium as best as possible, to maintain the sense of solemnity that should accompany the execution of public justice. Online hearings conducted with the participants in their own homes or workplaces are inherently less formal than in-person proceedings in the courtroom, given the loss of the iconography, architecture, and tradition that is commonplace in the courts and implicitly communicates their authority.

While this may be beneficial in some regards, such as by making self-represented litigants feel more comfortable, the symbols and formalities should be maintained where possible. For example, court attire, vows and procedures while online should be consistent with the courtroom norm in order. Crucially, judges and court staff must remain, and be seen to remain, strongly independent from the parties despite the more intimate forum.

Recommendations

9. Federal, state and territory governments should work with the courts to develop a digital operations strategy to cement beneficial digital progress made by the courts shifting to online operations. The strategy should ensure the use of technology in the courts enhances access to justice, open justice, and procedural fairness, and promotes equality before the law.

6. OPEN JUSTICE

The principle of open justice is a "hallmark of the common law system and is an essential characteristic of the exercise of federal judicial power"(61). It is integral to the rule of law and public trust and confidence in the courts. Former Chief Justice Spigelman stated:

> "It is well established 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." (62)

Open justice is a key feature of a fair trial. In Australia, hearings have traditionally been conducted in open court, with the press and members of the public able to attend in person to witness the administration of justice.

There are some limited exceptions to the principle of open justice, such as to protect national security, secret technical processes, or the safety or identity of a person (63). Courts may conduct proceedings 'in camera' or make suppression or non-publication orders where appropriate, to prevent prejudice to the proper administration of justice. While the situation of the COVID-19 crisis and its impact on the courts is unprecedented, we strongly believe it should not limit open justice.

The shift to digital operations in response to COVID-19 has curtailed open justice, which threatens public trust in the courts. For example, many courts have shut down their physical courtrooms, with hearings taking place online, effectively restricting the public and press from witnessing court processes. Professor David Rolph of Sydney University notes the important role of open justice and the media:

> "The media play an important and recognised role in ensuring transparency in the administration of justice - they can act as 'the eyes and ears of the public'. Departures from open justice may occur but should only happen when strictly necessary. The COVID-19 pandemic may require some departure from open justice but such departures occur, they need to be closely circumscribed and closely monitored, to ensure that they do no more than is strictly necessary."(64)

In order to preserve the institutional legitimacy of the courts during this shift to online operations, the principle of open justice needs to remain paramount. This could be facilitated through permitting physical attendance in courtrooms in accordance with social distancing requirements. For digital hearings, courts could enable interested members of the public and press to attend online hearings through providing public access to the platforms being used to conduct the virtual hearings.

This has recently been done in at least one case in the Federal Court. In Quirk v Construction, Forestry, Maritime, Mining and Energy Union (Remote Video Conferencing) [2020], Justice Perram ordered that the public be excluded from the physical hearing under s 17(4) of the Federal Court Act 1976 (Cth) due to the pandemic, but provided that a member of the public who wishes to observe the hearing could contact his Associate to be provided with online access to observe the hearing (65). In doing so, Justice Perram noted the principle of open justice:

"The Court has put in place the best practical arrangements that it has been able to at this point in time in the circumstances of the pandemic. These arrangements allow interested members of the public to witness the hearing by permitting them to be invited to observe the video conference hearing online...This procedure has, in fact, worked as at least one member of the public has observed the proceedings in this way."(66)

Another opportunity is to live stream hearings online on platforms such as YouTube or Facebook to facilitate open justice. The Federal Court of Australia has issued a Special Measures Information Note that requires consideration to be given to "the ability to live stream hearings so as to facilitate open and accessible courts"(67). For example, the Supreme Court of NSW live streamed the Queensland Floods Class Action from 29 April to 1 May 2020.

Dr Peter Cashamn and Eliza Ginnivan note the potential for "digital technology to radically enhance open justice by makingprocesses and proceedings more observable and transparent, including through streaming or broadcasting hearings, making messaging transcripts available and creating a publicly searchable database of court files". (68)

The use of technology by the courts could enhance open justice if live streaming of hearings is maintained post-COVID. This would likely result in greater public access to our courts, due to the ease of watching proceedings online, rather than having to attend a physical courtroom.

Recommendations

10. To facilitate open justice, the courts should, where appropriate:

    a. Facilitate physical attendance by the public and the press to courtrooms in accordance with social distancing requirements.

    b. Facilitate online attendance by the public and the press to virtual hearings, including through making hearings available through live streaming, including when the pandemic passes.

7. PROCEDURAL FAIRNESS

Procedural fairness lies at the heart of the right to a fair trial and "supports the rule of law by promoting public confidence in official decision-making"(69). In the courts, procedural fairness ensures a party is given the opportunity to present their arguments in court (70) and to test adverse evidence through cross-examination. With the transition to online hearings and trials due to the COVID-19 pandemic, courts need to ensure that procedural fairness is safeguarded.

Notably, the online environment may be seen to negatively impact a party's ability to cross-examine witnesses effectively. The right to confront an adverse witness by cross-examination has been described by the High Court to be 'of central significance to the common law adversarial system of trial'(71). As such, some parties may feel uncomfortable conducting cross-examination in an online setting, especially when it may be difficult to deduce the witness' demeanour and assess their credibility.

This unease was evident in Capic v Ford Motor Company of Australia Limited (Adjournment) (72) and ASIC v GetSwift Limited (73), where applications for adjournment were made on the basis that cross-examination by video-link was unsatisfactory. However, judges in both cases rejected the applications. Specifically, while the judges acknowledged that this mode of examination was not ideal due to a reduction in formality and in chemistry between counsel and the witness, the judges ultimately concluded that this arrangement would not result in an unfair trial (74).

Both judges cited their use of video-link in past cases and noted 'no diminution in being able to assess the difficulty witnesses were experiencing in answering questions, or their hesitations and idiosyncratic reactions when being confronted with questions or documents' (75). In fact, both judges perceived the video-link technology to allow them to better focus on the witness' facial expressions.(76)

These two cases can be contrasted with David Quince v Annabelle Quince (77), where an application for adjournment for the same reasons above succeeded (78). Justice Sackar observed that:

> "[there} will be many cases where the video link procedure will be more than fair and that issue will clearly have to be determined objectively on a case by case basis."(79)

Overall, in response to the pandemic, courts have remained flexible to ensure not only procedural fairness, but the efficient administration of justice. In the two cases where applications for adjournment did not succeed, while both judges shared a reasoned conviction to make the trials continue, they also expressed willingness to adjourn the trials if they were to become unworkable (80). This closely aligns with Sackar J's approach that questions regarding remote cross-examination and its implications for procedural fairness must be determined objectively on a case-by-case basis. We believe that the courts' current approach to dealing with concerns about remote cross-examination strike a good balance between procedural fairness and the efficient administration of justice.

Nonetheless, it should be noted that a party's perception of procedural fairness must remain a paramount consideration for judges in determining these matters. In a well-known anecdote where Sir Owen Dixon asks young lawyers who the most important person in the court is, he reminds them that this person is the litigant who is going to lose, because they must leave the court satisfied that they were treated fairly. After all, "it is the fairness of the procedure that leads to acceptance of the outcome" (81). Therefore, judges must ensure that they give due consideration to the parties' wishes for adjournment, and provide well-principled reasons in cases where they refuse the application.

Recommendations

11. To ensure an appropriate balance between procedural fairness to parties and the efficient administration of justice, the courts should develop guidelines for judges when assessing applications for adjournments due to COVID-19. The guidelines should:Specify that applications are to be determined objectively on a case by case basis, having regard to the nature of the proceedings.Specify that if judges refuse an application for adjournment, they must proactively adjourn the trial once it becomes apparent to them that procedural fairness is being negatively impacted on.

7.1 DELAYS

Courts were experiencing delays prior to the COVID-19 crisis and have been under significant pressure. This is demonstrated by long delays in finalisation of matters, backlogs in listing of matters, and delays in judicial appointments. These issues are largely caused by federal, state and territory governments systemically failing to properly resource courts to allow them to resolve disputes in a timely manner. These delays will inevitably be exacerbated by adjournments and increased demand in response to COVID-19.

Dianne Anagnos, Principal Solicitor at Kingsford Legal Centre reports the impact of COVID-19 delays on local court matters in NSW:

> "Existing delays in local court criminal and AVO matters are being significantly exacerbated by COVID-19. We've had clients who want to have AVOs varied who are waiting 3-6 months to have their matters heard. This raises huge concerns about the efficient administration of justice - justice delayed is justice denied … The government needs to urgently provide increased resourcing to the courts, tribunals and ombudsmen to facilitate them to fulfil their role of resolving disputes in a timely manner. Delays in response to COVID-19 are creating a huge gap in access to justice." (82)

Professor Michael Legg of UNSW Law states:

> "The court system and the legal profession should be congratulated for being able to keep the wheels of justice turning. However, there has also been many adjournments and vacating of court dates so that there will be a backlog of cases to be dealt with." (83)

For state and territory Supreme Courts and the Federal Court of Australia, the national benchmark for court efficiency is that "no more than 10 percent of lodgments pending completion are to be more than 12 months old" (84). However, the Supreme and Federal Courts are failing to meet this target. As of 30 June 2019, on average 18% of criminal cases and 29% of civil cases in state and territory Supreme Courts had been pending for over a year (85). In the Federal Court of Australia, 32% of cases had been pending for over a year (86). These statistics demonstrate that delays have been a serious issue plaguing Australia's upper courts long prior to the COVID-19 crisis.

In its report on Access to Justice Arrangements, the Productivity Commission found that "levels of court funding and judicial resourcing … have direct impacts on the timeliness of court outcomes, but are largely outside the control of the courts." (87) Courts in the criminal, civil and family jurisdictions are all experiencing delays, due to increasing demand for court services, a lack of resourcing, and delays in judicial appointments including in the Federal Court and Family Court.

Court delays exacerbate the stress and cost of legal processes for all parties, and have a significant impact on the most vulnerable in our community. People, including children, are spending longer time on remand awaiting criminal trials; families are suffering with uncertainty or living in situations of family violence while awaiting resolution of family law matters; and people living in regional, rural and remote areas are forced to travel to overburdened courts where their matter may be simply be listed for hearing, but not heard until another day. (88)

Existing delays in the justice system will be exacerbated by COVID-19. For example:

- Matters are being adjourned where procedural fairness is at risk in complex trials due to concerns about technology and the ability of parties to participate fully in trials.
- New jury trials are being suspended in 5 states and territories. For example, approximately 13 Supreme Court of NSW jury trials and 22 District Court of NSW jury trials have been delayed due to COVID-19.
- Defended criminal cases with a hearing date, where the accused is not in custody are being suspended in NSW until September.
- The High Court has suspended all hearings for April, May and June.
- The NSW local court has vacated all existing trials until 30 September 2020.
- Commonwealth offences which require trial by jury are being delayed.

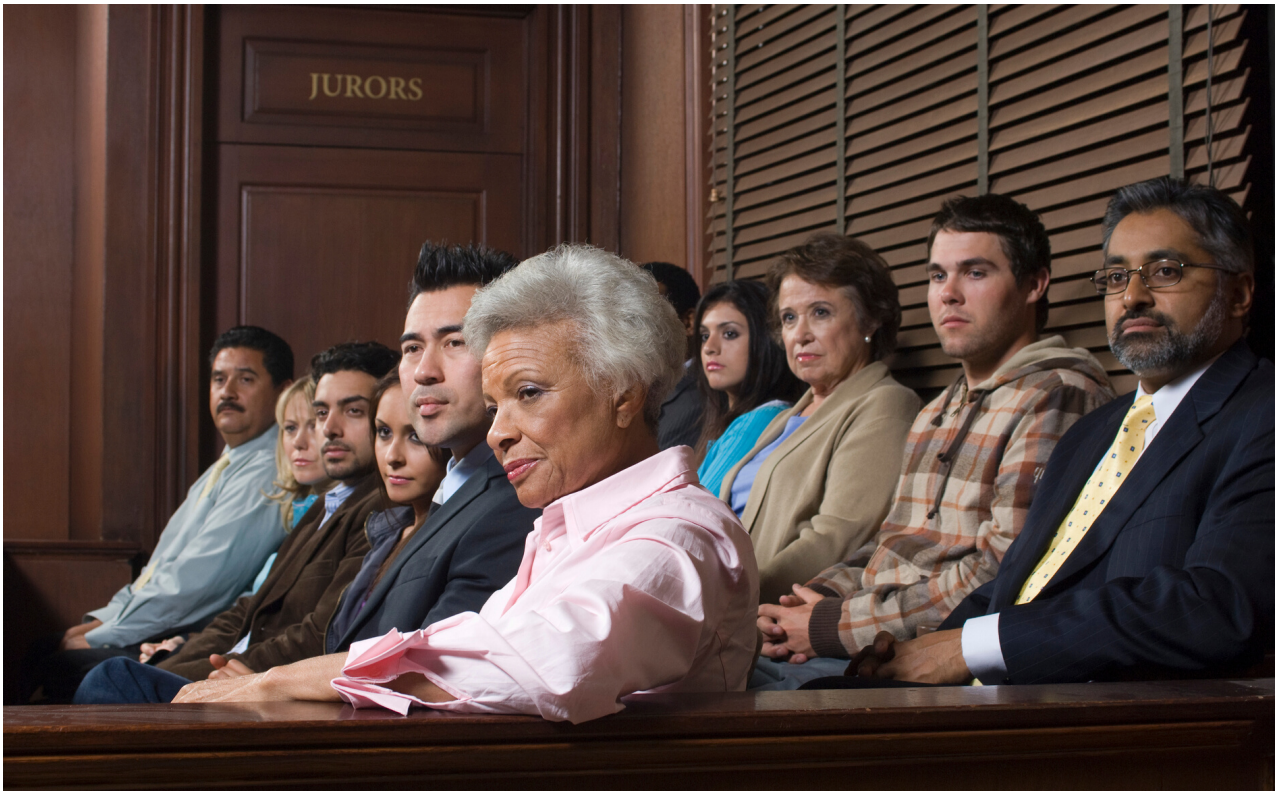
It has been reported that NSW judges will work during their summer break to assist with clearing the backlog of jury trials (89). Chief Justice of NSW, Tom Bathurst, said "delays, especially for those in prison awaiting trial, were "plainly a matter of concern … Most of the trials we do are relatively long trials, with a median of four to six weeks or thereabout, so it does add a significant backlog" (90). NSW District Court Chief Judge Derek Price has stated concern about the suspension of jury trials and delays caused (91). While the judiciary and courts' commitment to the administration of justice should be commended, working over breaks is not a sustainable method to address the huge backlog of cases.

Federal, state and territory governments must properly resource courts to enable them to fulfil their duty to hear disputes in a timely manner. Delays in judicial appointments must be minimised and the number of judicial appointments should increase where required to deal with increased caseloads.

Recommendations

12. Federal, state and territory governments should commission a full review of the resourcing needs of the judicial system, and properly resource the courts to enable them to fulfil their function of hearing disputes in a timely manner and clear existing backlogs. This should be accompanied by minimising delays in judicial appointments and increasing judicial appointments where required to deal with increased caseloads.

8. THE RIGHT TO A TRIAL BY JURY



A trial by jury is a key feature of Australia's criminal justice system. The right to a trial by jury is expressly enshrined in section 80 of the Australian Constitution. It provides that:

> "The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such places or places as the Parliament prescribes."(92)

As Australia has no federal charter of rights, the fact that the right to trial by jury is expressly guaranteed in the Constitution highlights its fundamental importance to Australian democracy. As Deane J noted in his dissenting judgment in Kingswell, (93)

> "[the right to a trial by jury reflects] a deep-seated conviction of free men and women about the way in which justice should be administered in criminal cases. That conviction finds a solid basis in an understanding of the history and functioning of the common law as a bulwark against the tyranny of arbitrary punishment... The

> nature of the jury as a body of ordinary citizens called from the community to try the particular case offers some assurance that the community as a whole will be more likely to accept a jury's verdict than it would be to accept the judgment of a judge or magistrate who might be, or be portrayed as being, over-responsive to authority or remote from the affairs and concerns of ordinary people."(94)

The right to a trial by jury is an important safeguard against potential abuses of power, and is a crucial institution that enables citizens to actively participate in democracy, the administration of justice, and the rule of law. However, since the outbreak of COVID-19, five of eight Australian states and territories (New South Wales (95), Queensland (96), Victoria, Western Australia and the Australian Capital Territory) have now suspended new jury trials in line with social distancing rules, and have made arrangements for criminal trials to proceed as judge-alone trials. In these states and territories, with the exception of the ACT, judge-alone trials are available where the accused has consented, waiving their right to a trial by jury.

In the ACT, the Supreme Court Act 1933 (ACT) was amended by the COVID-19 Emergency Response Act 2020 (ACT) to provide that all trials going ahead in the COVID-19 emergency period can proceed as judge-alone trials, whether the accused consents or no (97)t. While the accused can make submissions to the court if they object to a judge-alone trial, this transition to judge-alone trials has nevertheless placed the fundamental right to a trial by jury under threat, and is currently subject to constitutional challenge.(98)

National Aboriginal and Torres Strait Islander Legal Services has raised concerns about the shift to judge-alone trials for First Nations People, stating:

> "A right to a trial by jury is a staple of our legal system and one of the few constitutional protections we have in Australia … Moving to judge-only trials, particularly in jurisdictions like the ACT, where a judge can order such a trial without the consent of the accused, is concerning. These measures have been introduced during an emergency and with little oversight and no consultation. Because of the disadvantage First Nations people have in the criminal legal system our members are concerned of biased decisions, particularly because of the lack of diversity in the Australian judiciary." (99)

The Hon. Marcia Neave AO, former Justice of the Victorian Court of Appeal expressed concern about the move to judge-alone trials:

> "I'm a believer in jury trials. The shift to no new jury trials will have a terrible effect on people on remand. As a result of refusal of bail, people may be confined in circumstances where they won't be safe. In Victoria, judge alone trials were previously not available for criminal matters. While judge-alone trials for criminal matters may be a necessary response to COVID-19, I'd be very concerned if they continued after the crisis passes."(100)

Some have argued that a transition to judge-alone trials is not only necessary for public health considerations, but it is also necessary in the interest of the efficient administration of justice (101). Judge-alone trials will ensure that the criminal justice system continues to operate, and that justice is still delivered in a timely manner. This is especially significant for those currently on remand and in custody, who are suffering continuing and lengthy deprivations of liberty. Furthermore, delayed trials can lead to the loss of evidence, and also prolong the trauma experienced by victims.

However, there are practical issues that will arise from judge-alone trials. First, judge-alone trials may do little to reduce the backlog of cases. Unlike juries that do not have to provide any reasons for their verdict, judges have to produce written decisions that outline their reasons for their verdict. This may lead to delays in cases being decided, and it is likely that these written decisions will enlarge the scope for appeals and prompt those convicted to appeal verdicts (102). Second, most states are currently prioritising trials in which the accused has opted to proceed on a judge-alone basis. This may result in accused people ill-advisedly waiving their right to a trial by jury despite contrary advice from their lawyers, and opting for judge-only trials in the hope their case will be heard sooner.

Ultimately, these issues highlight a significant tension between public health considerations, the efficient administration of justice and the right to a trial by jury. Close scrutiny of judge-alone trials will be needed to properly safeguard the fair administration of justice and the reputation of courts in our democracy. More importantly, once COVID-19 social distancing measures are relaxed, it will be imperative for states and territories to cede the COVID-19 arrangements in relation to judge-alone trials, and to make jury trials available once more.

Recommendations

13. State and territory governments must ensure that accused persons receive legal advice about their right to a trial by jury and the risks of judge-alone trials prior to waiving their right to trial by jury.

14. State and territory governments should make new jury trials available immediately after social distancing rules are relaxed to ensure the right to trial by jury is available, and to allow citizens to perform the vital democratic function of jury service.

15. The ACT government should immediately repeal section 68BA of the Supreme Court Act 1933 (ACT) that provides for judge-alone trials without the accused's consent.

9. FAMILY AND DOMESTIC VIOLENCE DURING COVID-19

Family and domestic violence has increased during the COVID-19 lockdown in Australia. NSW Attorney-General Mark Speakman announced that Google searches on domestic violence have increased by 75% since the first recorded COVID-19 cases in NSW (103). Family and domestic violence services report perpetrators are using the threat of spread or exposure to COVID-19 to control women and children (104).

The lockdown means many women and children are confined in the home with their perpetrators 24 hours a day, limiting family and domestic violence victims/survivors' ability to seek help and legal assistance. The Hon Marcia Neave AO, former Commissioner of the Royal Commission into Family Violence in Victoria notes, "There's a concern that people will be locked up with violent perpetrators, and won't be able to leave the house to go to work on school which normally provides some respite – that has a potential to escalate things." (105)

Pip Davis, Principal Solicitor of Women's Legal Services NSW states:

> "We know that many women are hesitant or unable to safely seek out and obtain legal advice by phone; they are unable to leave the house to attend usual services where they can attend in person, they fear being overheard by the perpetrator who is also more likely than not to be locked down and in the house with the victim/survivor and she often has children at home because they are undertaking remote learning and this too impacts the capacity to have a confidential conversation." (106)

On 28 April 2020, the Family Court of Australia established a fast-tracked COVID-19 list to deal with urgent COVID-19 applications on a national basis. Matters are being heard by a judge within 72 hours of assessment (see Section 11.1.3 below for further detail).

The 'COVID-19 List' includes urgent matters that have been filed as a direct result of the COVID-19 pandemic, and can't be resolved electronically or by other means (107). Some examples of matters suitable for filing under the COVID-19 list include those that arise due to:

- the increased risk of family violence as a result of social distancing restrictions;
- parties and children who cannot fulfil parenting obligations due to illness or concerns of COVID-19 infection;
- children who cannot travel to parties' residences across different states and territories due to border restrictions
- where a parenting arrangement requires supervised contact, and the contact centre is closed. (108)

Pip Davis of Women's Legal Service NSW states that "[t]he list has only been operating for a week so it's very early days but we are optimistic that it will go some way toward addressing some of the access to justice concerns. It is of course also possible that the introduction of the COVID list will act as a deterrent to a perpetrator parent who might have otherwise used the pandemic as an excuse for doing things such as withholding children and this will also be a positive in terms of access to justice."(109)

The Family Court and Federal Court have worked at great effort to establish a COVID-19 list to address urgent matters. Virtual hearings provide an opportunity to allow for the remote appearance of parties where safety is a concern, particularly for family and or domestic violence matters.

Pip Davis details benefits of moving some family law matters online:

> "There is no need to travel into court, which saves significant time and it also means parties don't need to physically attend court, which aside from the time factor, can alleviate some of the safety issues that are present for our clients when they attend court. It's also likely there will be benefits for those parties who live in RRR [regional, rural and remote] areas where previously they may have had to wait for the next circuit to appear whereas now, matters may be able to proceed in a much more timely manner. Hopefully this will relieve some of the pressure on those circuit lists, leaving those days for hearings or complex mentions rather than simple procedural directions." (110)

Further consideration should be given to the use of virtual hearings in family law matters once the crisis passes, particularly for procedural matters and matters where safety is a concern so that perpetrators and victim-survivors can give evidence remotely.

Recommendations

16. The Federal Government should properly resource the Family Court and Family Circuit Court in order to enable the efficient administration of justice.

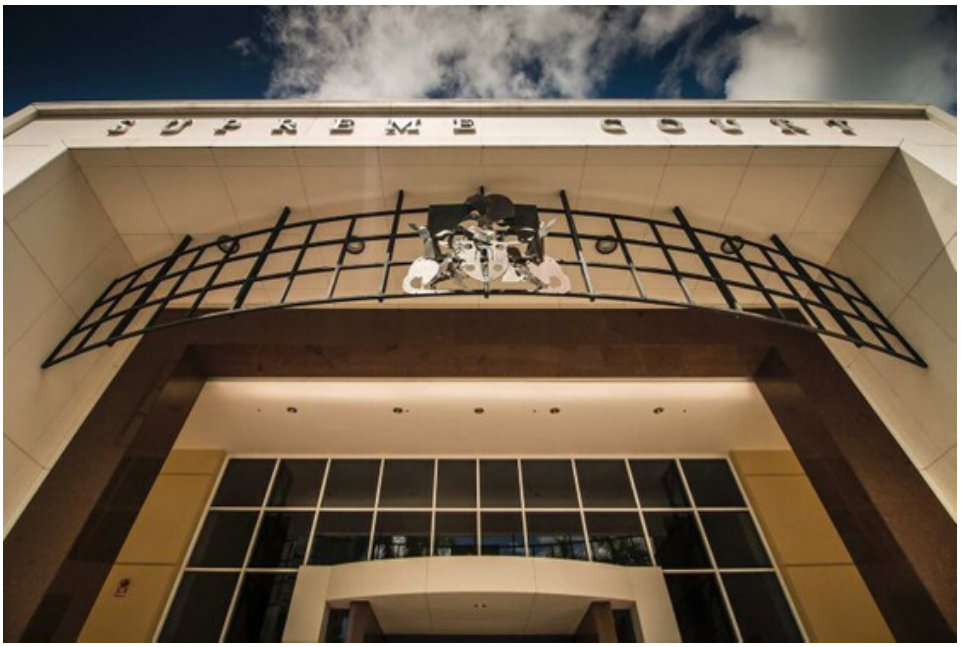
17. The Family Court and Federal Circuit Court should consider making virtual hearings available on an ongoing basis for family law matters where safety is a concern. The federal government should adequately resource the Family Court and Federal Circuit Court to enable this.

10. CONCLUSION

The shift to online operations in response to COVID-19 provides an opportunity for the courts to move their digital operations into the 21st century and, if done carefully, strengthen their democratic role in society. In the transition to online courts, this role and the rule of the law must be safeguarded, and public trust in the courts must be maintained.

Any move to entrench digital progress in the courts must be done in consultation with judicial officers, court staff, legal practitioners and court-users, particularly vulnerable communities that most often come into contact with the justice system, and their representatives in order to ensure that key principles of our justice system, including access to justice, open justice and procedural fairness are enhanced rather than endangered by a shift to online operations.

Technology provides opportunities to increase access to justice for the most marginalised in our society. But in order to enhance the opportunities provided by technology, Australian governments must properly resource the courts and the legal assistance sector. In parallel, in order to enable the full participation of parties in virtual hearings, governments must also promote digital inclusion and digital literacy, or risk entrenching further barriers to access if left unaddressed.



APPENDIX A

HOW COURTS ARE OPERATING DURING COVID-19

11.1 FEDERAL COURTS

11.1.1 High Court of Australia

All of the High Court's sittings in April, May and June 2020 have been vacated, with future sittings to be reviewed in June 2020 (111). Judgments will continue to be delivered during this period, and electronic signatures and filing of documents have been allowed.

The counters of the registry have ceased all face to face services from 24 March 2020 (112). The HCA has adopted a Digital Lodgment System Portal (DLS Portal), which provides for the mandatory electronic lodgment of all court documents filed in all cases commenced after 1 January 2020. The DLS Portal is an external facing portal allowing law firms, practitioners and litigants to register and file documents, and track the progress of their cases. At least one hearing has been conducted entirely by videolink - Cumberland v The Queen, before three judges. (113)

11.1.2 Federal Court of Australia

All matters in the Federal Court of Australia that require in person attendance, including listings requiring videolink from the court's premises until 30 June 2020, have been vacated (114). The court has been contacting all affected individuals to organise alternative arrangements where possible.

The Chief Justice of the Federal Court of Australia has published three 'Special Measures Information Notes' (Special Measures in Response to COVID-19 SMIN). These set out the court's alternative arrangements for:

1. SMIN - 1 – General Matters (updated 31 March 2020) (115)
2. SMIN - 2 – Admiralty and Maritime (1 April 2020) (116)
3. SMIN - 3 – Appeals and Full Court Hearings (7 April 2020) (117).

The overarching purpose of these measures is provided for in SMIN-1:

> Due to the COVID-19 pandemic, where appropriate and necessary, the Federal Court is modifying its practices in order to minimise in person attendance on Court premises, with the Court's priority being the health and safety of the community, and in particular, parties, practitioners, judges and staff, and the families of all of these groups. (118)

SMIN1 provides that "all matters before the Full Court shall be conducted as electronic appeals, and approval in accordance with the APP2 [Content of Appeal Books and Preparation for Hearing Practice Note] is no longer required". To the extent possible, the Federal Court is now conducting hearings through the software Microsoft Teams. (119)

No "in person" hearings are allowed, unless exceptional circumstances necessitate, and prior approval by the Chief Justice is given. For hearings that would ordinarily require in person attendance of half a day or less, legal practitioners are being urged to reach an agreement on whether these matters could be dealt with 'on the papers' (120). Longer listings will undergo a triaging and prioritisation process to determine what technology would be adequate. (121)

To facilitate the electronic filing of all documents, electronic signatures and unsworn affidavits are temporarily allowed, with the assumption that they would be sworn or affirmed when this is possible. (122)

Prior to COVID-19, if a party to a civil case sought to use video link to make submissions or appearances, it was mandatory to first obtain leave of the court (123). The court was not to exercise that power unless the technological requirements under section 47C of the Federal Court of Australia Act 1976 (Cth) could be satisfied (124). These included ensuring that the speed and quality of the transmission was sufficient, and that equipment was available to all parties (125). The Federal Court has cited that adherence to the requirements in section 47C are important for ensuring the 'integrity of the process'. (126)

The fee attached to a single video link for 60 minutes was $600 (127). "In every situation where it is proposed to use a video link, the Court must consider whether this will provide a just, timely, economic and efficient use of the Court's and the parties' resources and aid the progress or resolution of the litigation."(128)

The Federal Court's willingness to adjourn under COVID-19

Justice Perram's case management decision in Capic v Ford Motor Company of Australia Ltd (Adjournment) [2020] FCA 486 in the Federal Court provides some insight into the judicial perspective on some commonly occuring complaints about the shift to virtual hearings (129). These include concerns about:

1. Unreliable technology;
2. The physical separation of legal teams who are unable to communicate during the hearing;
3. Calling on expert witnesses;Lost chemistry in relation to lay witnesses, in particular during cross-examination;
4. Document management problems;
5. Future issues such as practitioners or witnesses failing ill, or having caring responsibilities during a trial;
6. Virtual trials which increase hearing times and expense.

Perram J addresses and acknowledges the difficulties and tediousness of all these issues, but despite all of these complaints, finds that none would cause an unjust or unfair trial:

> Under ordinary circumstances, I would not remotely contemplate imposing such an unsatisfactory mode of a trial on a party against its will. But these are not ordinary circumstances and we have entered a period in which much that is around us is and is going to continue to be unsatisfactory. I think we must try our best to make this trial work. If it becomes unworkable then it can be adjourned, but we must at least try. (130)

11.1.3 Family Law Courts

On 28 April 2020, Chief Justice Alstergren of the Family Court of Australia issued a Joint Practice Direction 3 ('JPD 3') to accommodate urgent family law applications before both the Family Court and the Federal Circuit Court (131). The JDP 3 establishes a "fast-tracked, national list in each Court... to allow the courts to swiftly deal with urgent COVID-19 applications on a national basis". (132)

The 'COVID-19 List' includes urgent matters that have been filed as a direct result of the COVID-19 pandemic, and can't be resolved electronically or by other means (133). Some examples of matters suitable for filing under the COVID-19 list include those that arise

due to:

- the increased risk of family violence as a result of social distancing restrictions
- parties and children who cannot fulfill parenting obligations due to illness or concerns of COVID-19 infection
- children who cannot travel to parties' residences across different states and territories due to border restrictions
- where a parenting arrangement requires supervised contact, and the contact centre is closed. (134)

All documents lodged in the Family Court and Federal Circuit Court are to be filed electronically, and where this is not possible, documents should be emailed to the registry for filing (135). The courts are not accepting hard copies of documents that are posted to the registry (136). Documents including affidavits that need to be signed under legislation may be done so electronically. (137)

Chief Justice Alstergren has promised that those on the COVID-19 list will receive the immediate attention of a dedicated registrar, who will triage the matter and will "allocate it to be heard by a judge within 72 hours of being assessed"(138)

11.2 SUPREME COURTS

11.2.1 ACT

Special arrangements have been made by the Supreme Court of the Australian Capital Territory in response to COVID-19. (139)

Many of the Court's processes are now operating remotely. All critical documents are to be filed electronically via the court portal or via email, unless the person filing documents cannot access email or the documents are Court of Appeal appeal books. (140) All pre-trial criminal and civil applications, as well as appeals from the Magistrates Court, are also now to be conducted via audio-visual link unless otherwise ordered (141). The Registrar will also conduct their lists by telephone. (142)

However, some processes remain the same. All civil hearings are continuing as listed, and all civil mediations will proceed as usual (143). All criminal case conferencing will also proceed as usual, where persons in custody will attend (144). In the event transportation becomes unavailable for persons in custody, they will participate remotely (145). Sentencing hearings will also be conducted in person unless otherwise advised. (146)

The Court of Appeal sittings in May will also be proceeding in larger courtrooms (147). In civil matters and criminal appeals where the party is not in custody, the parties may be present in court, regardless of whether their legal representative is appearing remotely (148). Persons on bail should attend court only for substantive hearings. (149)

Significantly, all jury trials will not proceed until further notice (150) (see Section 8 of this report for further discussion of criminal trials). Parties will receive notices under section 65BA(4) of the Supreme Court Act 1933 (ACT) if the trial is proposed to proceed by judge alone (151). Parties may make submissions within 7 days of the notice. If there is an objection to a judge alone trial, the matter will be subsequently fixed for determination.

All persons attending court must observe social distancing, hygiene practices and comply with the order made by Chief Justice Murrell on 31 March 2020 (152). This order prohibits anyone who has been diagnosed, is waiting for a diagnosis or has been in close contact with anyone with COVID-19 from entering the courtroom (153). Anyone who does not have immediate business at the premises, or has completed their

business is also excluded (154). Contravention of this order can attract a penalty of $8, 000 for individuals and/or 6 months imprisonment. (155)

11.2.2 New South Wales

The Supreme Court of NSW made special arrangements to its court processes in response to COVID-19, which are outlined in the Arraignments List - Procedural Directions, dated 15 April 2020. (156)

The Procedural Directions provided that:

- there would be no appearances in person, until further notice; (157)
- Both practitioners and the accused would appear via audio-visual link via Microsoft Teams; (158)
- Cases would be listed on a staggered basis, with an earliest start time of 8:00am and the latest finishing time of 6:00pm. (159)
- Where an accused does not wish to appear remotely, the accused's legal representatives were to send an email to the Criminal List Judge's chambers no later than midday the day before the list is to be called over. The request will be considered in chambers and the parties advised by email whether there will be a direction under section 22C(5) of the Evidence (Audio and Audio Visual Links) Act 1998 (NSW) for the accused to appear remotely.

Face-to-face court-annexed mediations have also been temporarily suspended from 23 March 2020. Mediations are now to proceed by way of teleconference (161). All court documents are now required to be filed electronically. (162)

On 20 May 2020, the Supreme Court of NSW announced its first steps towards resuming face-to-face hearings. Some face-to-face civil hearings (163) (with limited parties, witnesses and legal representatives) will resume on 1 June 2020, followed by criminal jury trials from 29 June 2020 (164). It is envisaged that due to improved technology, some of the lists will continue to be dealt with online. (165)

For criminal trials, all current jury trials will continue (166) (see Section 8 of this report for further discussion of criminal trials). New jury trials were temporarily suspended from 16 March 2020, and are due to recommence on 29 June 2020. While jury trials were suspended, parties were encouraged to consider whether a judge-alone trial was feasible in the circumstances of the particular trial. If the consent of the accused was forthcoming, the Crown was then to consider its position and advise the accused and

the Court without delay. If an accused did not consent to a judge-alone trial, the matter would not proceed, and would remain in the arraignment list for allocation at a later date, which raised concerns about people being held on remand for extended periods. (167)

11.2.3 Northern Territory

The Supreme Court of the Northern Territory has made special arrangements in response to COVID-19.

All documents are now required to be filed electronically, and public facing counters are now closed. The Registry will contact parties via telephone and email in relation to suspended trials to organise pre-trial hearings, mentions and directions hearings, which are to be conducted by telephone or audio-visual link (168). However, if a party wishes the matter to proceed by face-to-face hearing rather than remotely, he/she must submit a brief outline by email to the Presiding Judge's Associate explaining the reasons for that position and the Judge may determine that counsel should appear in person (169). For criminal hearings, the accused will be excused from attending if legally represented. (170)

Current jury trials where a jury has already been empanelled will continue (171) (see Section 8 of this report for further discussion of criminal trials). All new jury trials are suspended until 5 June 2020 (172). Matters which have been listed for the pre-recording of evidence or voir dire hearings which do not require the selection and empanelment of a jury will, however, proceed as presently listed. (173)

11.2.4 Queensland

The Supreme Court of Queensland has made special arrangements in response to COVID-19 (174). All documents are now to be filed electronically, and there are no direct counter services.

From 18 March 2020, all applications were to be emailed to the Court, and heard on the papers where appropriate or via telephone or audio-visual link. Only urgent applications were dealt with in person. From 21 May 2020, where applications require an oral hearing, parties and practitioners are expected to attend the court in person for the hearing, but may be granted leave to appear by telephone or video conference if it is not practicable to appear in person (175). The Presiding Judge will determine whether the matter can be conducted via remote means. (176)

Similar to other states and territories, all new jury trials were suspended from 18 March 2020, with existing trials to be completed (177) (see Section 8 of this report for further discussion of criminal trials). On 21 May 2020, the Supreme Court of Queensland announced that provided public health considerations permit the move on 12 June 2020 to stage 2 restrictions in Queensland, jury trials will be resumed, with limitations and precautions, in the second half of 2020 (178).

11.2.5 South Australia

The Supreme Court of South Australia has also made changes to its operation, but not to the same extent as its state and territory counterparts. Notably, there have been no changes to arraignment, and affidavits must continue to be witnessed in person, with safety precautions in place (179).

All court documents are to be filed electronically (180). Directions hearings, as well as civil and criminal listing conferences, will now be conducted by electronic audio communications unless otherwise decided by the Presiding Judge (181). Mediations are also postponed, unless all parties consent to mediation taking place. Settlement conferences will be held at alternative venues (182).

However, civil trials will continue as usual (183). Sentencing hearings will also proceed as normal, but parties will be required to take reasonable steps to minimise the length of the hearing, including by providing factual summaries, chronologies and submissions the day before the hearing (184).

Defendants in custody will appear via audio-visual link (185)

Unlike its state/territory counterparts, the Supreme Court of South Australia will continue to hold new jury trials, but they are to be managed consistent with public health directions. There are exemptions available for jurors who are genuinely anxious about or physiologically vulnerable to COVID-19 (186).

11.2.6 Victoria

Many of the Supreme Court of Victoria's processes are now operating remotely. Civil matters will be heard by Cisco Webex, Skype or Zoom depending on the requirements of the proceeding (187).

Court of Appeal hearings will be conducted by audio-visual link, but Judges and court staff will still be present in court. Judgments will be delivered remotely (188). Mediation services and hearings will also continue via telephone or audio-visual link (189).

Within the Practice Court, matters will be dealt with by default by a Judge in chambers on the papers, unless opposed by either party. If a hearing is required, it will be conducted via audio-visual link (190).

Within the Commercial Court, directions hearings and interlocutory applications will only be heard in-person in exceptional circumstances. Trials will be conducted electronically, and shorter trials will be prioritised (191).

In relation to criminal matters, new jury trials will not commence, but existing trials will continue as usual (192) (see Section 8 of this report for further discussion of criminal trials). Non-jury matters such as pleas, applications and preliminary hearings will continue where parties are available, and criminal hearings will only be conducted by Webex or existing VideoLink technology. Within the common law division, jury trials will now proceed before a judge alone, and will be heard via telephone or audio-visual link. Where in-person hearings are required, strict time limits will be imposed (193).

There have also been arrangements to fast track homicide matters to the Supreme Court, with the consent of the accused to forego his/her right to a committal hearing (194). Specifically, parts of the committal process will progress straight to the Supreme Court to assist the caseload of the Magistrates' and Children's Courts. In such cases, the Supreme Court will deal with all of the disclosure and pre-trial witness examination.

11.2.7 Western Australia

The Supreme Court of Western Australia has made special arrangements in response to COVID-19. The Hon Justice Peter Quinlan Chief Justice of Western Australia released a notice on 18 March detailing the Court's COVID-19 response (195). The provisions of the 18 March notice continue to apply, with some exceptions (196). Proceedings involving witnesses giving oral evidence (which from 27 March 2020 were only to proceed with approval of the Chief Justice based on the urgency of the matter) may now be listed for hearing in the usual manner (197). Civil trials will be conducted in the normal manner, with attendance of counsel, solicitors and parties in person, provided that social distancing of 1.5 metres can be observed (198). Wherever possible, contested chambers hearings and General Division appeals will be conducted in person (199).

From 27 March 2020, in-person appearances at appeal hearings were suspended (200). Appeals were conducted by telephone or audio-visual link. In appeals that involved calling witnesses, only counsel and self-represented parties could be present in the courtroom.

Witnesses were required to appear by audio-visual link from a remote location (201). From 15 May 2020, in criminal appeal hearings where all parties are legally represented, counsel and one instructing solicitor for each party may appear in person at all hearings provided that social distancing of 1.5 metres is observed (202). An offender can appear by video link or telephone (203).

Case management conferences, strategic conferences and directions hearings will continue to be conducted by telephone at the discretion of the judicial officer (204). Delivery of judgments are to be conducted by telephone or on the papers. There will be no new mediation conferences other than in exceptional circumstances. Notably, mediations may be conducted by telephone or in larger mediation rooms to ensure appropriate social distancing (205).

In relation to criminal matters, all jury trials listed to commence in April, May and June 2020 are vacated and will be listed for a status conference in July 2020 (206) (see Section 8 of this report for further discussion of criminal trials). Trials by judge alone listed to commence in April, May and June 2020 will proceed as listed. Parties may make applications for a trial by judge alone, and it will be heard and determined as a matter of priority. Judge-alone trials will be listed to commence in May or June 2020 (207)

11.2.8 Tasmania

The Supreme Court of Tasmania has transitioned most of its operations to be conducted remotely (208). Specifically, matters will be heard via audio-visual link or telephone as much as possible, and sentences will be delivered via audio-visual link. Bail applications are to be made via email, and defendants in custody will not be brought to Court, unless otherwise directed by a Judge (209).

Judges will continue to hear guilty pleas, and Judges may conduct directions hearings via telephone (210). Jury trials will not resume until at least 21 July 2020 (211) (see Section 8 of this report for further discussion of criminal trials).

Tables:: Summary of the operation of state and territory Supreme Courts

New South Wales

Court documents	Filed electronically, no direct counter services generally
Criminal matters Jury trials	New jury trials suspended from 18 March 2020, existing trials to be completed. New jury trials will recommence from 28 June 2020.
Judge only trials	Implemented
Civil matters	Generally conducted remotely Some face-to-face civil hearings will resume on 1 June 2020.
Sentencing	Hearings conducted remotely
Directions hearings, civil and criminal listing conferences	Generally conducted remotely
Mediations	Generally conducted remotely

Queensland

Court documents	Filed electronically, no direct counter services generally
Criminal matters Jury trials	New jury trials suspended from 18 March 2020, existing trials to be completed. New jury trials will recommence in second half of 2020.
Judge only trials	Implemented
Civil matters	Generally conducted remotely From 21 May 2020, where applications require an oral hearing, parties and practitioners are expected to attend the court in person for the hearing, but may be granted leave to appear by telephone or video conference if it is not practicable to appear in person.
Sentencing	Hearings conducted remotely
Directions hearings, civil and criminal listing conferences	Generally conducted remotely
Mediations	Generally conducted remotely

Victoria

Court documents	Filed electronically, no direct counter services generally
Criminal matters Jury trials	New jury trials suspended, existing trials to be completed.
Judge only trials	Implemented
Civil matters	Generally conducted remotely In the Commercial Court, directions hearings and interlocutory applications will only be heard in-person in exceptional circumstances.
Sentencing	Hearings conducted remotely
Directions hearings, civil and criminal listing conferences	Generally conducted remotely
Mediations	Generally conducted remotely

Western Australia

Court documents	Filed electronically, no direct counter services generally
Criminal matters Jury trials	New jury trials suspended, existing trials to be completed
Judge only trials	Implemented
Civil matters	Generally conducted remotely Proceedings involving witnesses giving oral evidence may now be listed for hearing in the usual manner. Civil trials will be conducted in person, provided that social distancing can be observed. Wherever possible, contested chambers hearings and General Division appeals will be conducted in person.
Sentencing	Hearings conducted remotely
Directions hearings, civil and criminal listing conferences	Generally conducted remotely
Mediations	Generally conducted remotely

ACT

Court documents	Filed electronically, no direct counter services generally
Criminal matters Jury trials	New jury trials suspended, existing trials to be completed.
Judge only trials	Implemented
Civil matters	Generally conducted remotely. Proceedings involving witnesses giving oral evidence may now be listed for hearing in the usual manner. Civil trials will be conducted in person, provided that social distancing can be observed. Wherever possible, contested chambers hearings and General Division appeals will be conducted in person.
Sentencing	Hearings conducted remotely
Directions hearings, civil and criminal listing conferences	Generally conducted remotely
Mediations	Generally conducted remotely

Tasmania

Court documents	Filed electronically, no direct counter services generally
Criminal matters Jury trials	New jury trials suspended, existing trials to be completed
Judge only trials	Not yet implemented
Civil matters	Generally conducted remotely
Sentencing	Hearings conducted remotely
Directions hearings, civil and criminal listing conferences	Generally conducted remotely
Mediations	Generally conducted remotely

Northern Territory

Court documents	Filed electronically, no direct counter services generally
Criminal matters Jury trials	New jury trials suspended, existing trials to be completed.
Judge only trials	Not yet implemented
Civil matters	If a party wishes the matter to proceed by face-to-face hearing rather than remotely, they must submit a brief outline by email to the Presiding Judge's Associate explaining the reasons for that position and the Judge may determine that counsel should appear in person.
Sentencing	Hearings conducted remotely
Directions hearings, civil and criminal listing conferences	Generally conducted remotely
Mediations	Generally conducted remotely

South Australia

Court documents	Filed electronically, no direct counter services generally
Criminal matters Jury trials	Ongoing as usual
Judge only trials	Implemented
Civil matters	Ongoing as usual
Sentencing	Ongoing as usual
Directions hearings, civil and criminal listing conferences	Generally conducted remotely
Mediations	Generally conducted remotely

REFERENCES

(1) Interview with Michael Legg, Professor in the Faculty of Law, UNSW, and Director of the Law Society of NSW Future of Law and Innovation in the Profession (FLIP) stream (by email, 6 May 2020).

(2) Capic v Ford Motor Company of Australia Limited (Adjournment) [2020] FCA 486, [23].

(3) Chief Justice James Allsop, 'Technology and the Future of the Courts' (2019) 38(1) University of Queensland Law Journal 1, 7.

(4) Cumberland v The Queen [2020] HCATrans 49.

(5) Julian Thomas et al, Measuring Australia's Digital Divide: Australian Digital Inclusion Index 2019 (Report, 2019) <https://digitalinclusionindex.org.au/wp-content/uploads/2019/10/TLS_ADII_Report-2019_Final_web_.pdf>.

(6) 'Household Use of Information Technology, Australia, 2016-17', Australian Bureau of Statistics (Web Page, 28 March 2018) <https://www.abs.gov.au/ausstats/abs@.nsf/mf/8146.0>.

(7) Ibid.

(8) Ibid.

(9) Julian Thomas et al, Measuring Australia's Digital Divide: Australian Digital Inclusion Index 2019 (Report, 2019) <https://digitalinclusionindex.org.au/wp-content/uploads/2019/10/TLS_ADII_Report-2019_Final_web_.pdf>.

(10) National Aboriginal and Torres Strait Islander Legal Services (by email, 8 May 2020).

(11) Interview with Dianne Anagnos, Principal Solicitor of Kingsford Legal Centre (by email, 7 May 2020).

(12) Interview with Michael Legg, Professor in the Faculty of Law, UNSW, and Director of the Law Society of NSW Future of Law and Innovation in the Profession (FLIP) stream (by email, 6 May 2020).

(13) Interview with Pip Davis, Principal Solicitor of Women's Legal Service NSW (by email, 7 May 2020).

(14) Chief Justice JLB Allsop, 'Special Measures In Response to COVID-19 (SMIN-1)', Federal Court of Australia (Special Measures Information Note, 31 March 2020) [12] <https://www.fedcourt.gov.au/__data/assets/pdf_file/0004/62374/SMIN-1-31-March-2020.pdf>.

(15) Interview with Michael Legg, Professor in the Faculty of Law, UNSW, and Director of the Law Society of NSW Future of Law and Innovation in the Profession (FLIP) stream (Maria Nawaz, 6 May 2020).

(16) Interview with Dr Peter Cashman, Barrister and Adjunct Professor of Law, UNSW (by email, 11 May 2020).

(17) Interview with Pip Davis, Principal Solicitor of Women's Legal Service NSW (by email, 7 May 2020).

(18) Richard Ackland, 'Lines dropped out, witnesses didn't know where to go': justice in times of coronavirus', The Guardian (online, 21 April 2020) <https://www.theguardian.com/commentisfree/2020/apr/21/lines-dropped-out-witnesses-didnt-know-where-to-go-justice-in-times-of-coronavirus?CMP=share_btn_tw>.
(19) Fiona McLay, 'A solicitor's guide to a virtual hearing using Microsoft Teams', LinkedIn (Article, 26 April 2020) <https://www.linkedin.com/pulse/solicitors-guide-virtual-hearing-using-microsoft-teams-fiona-mclay/>.

(20) R v Macdonald; R v Edward Obeid; R v Moses Obeid (No 11) [2020] NSWSC 382.R v Macdonald;

(21) R v Edward Obeid; R v Moses Obeid (No 11) [2020] NSWSC 382, [29].

(22) Peter Cashman and Eliza Ginnivan, 'Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions' (2019) 19 Macquarie Law Review 39, 56.

(23) Parliament of Victoria Law Reform Committee, Technology & the Law (Report, May 1999) 109–110 <https://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/technology/final_report.pdf>.

(24) Ibid, 110.

(25) Asha Barbaschow, 'Australian Privacy Foundation labels CLOUD Act-readying Bill as 'deeply flawed'', ZDNet (online, 3 April 2020) <https://www.zdnet.com/article/australian-privacy-foundation-labels-cloud-act-readying-bill-as-deeply-flawed/>.

(26) Office of the Australian Information Commissioner, 'Commissioner Launches Federal Court Action against Facebook' (Media Release, 9 March 2020) <https://www.oaic.gov.au/updates/news-and-media/commissioner-launches-federal-court-action-against-facebook/>.

(27) Ibid.

(28) Productivity Commission, Access to Justice Arrangements - Inquiry Report (Report, 3 December 2014).

(29) Interview with Dr Peter Cashman, Barrister and Adjunct Professor of Law, UNSW (by email, 11 May 2020). See also Peter Cashman and Eliza Ginnivan, 'Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex litigation and Class Actions' (2019) 19 Macquarie Law Journal 2019 39.

(30) Productivity Commission, Access to Justice Arrangements - Inquiry Report (Report, 3 December 2014) 578

(31).Ibid, 579.

(32) Commonwealth Attorney-General's Department, Submission No 137 to the Productivity Commission, Inquiry into Access to Justice Arrangements (12 December 2013) 36.

(33) Ibid.

(34) Interview with the Hon Marcia Neave AO (by phone, 7 May 2020).

(35) Nicola Berkovic, 'Judges cut holidays to clear backlog of jury trials', The Australian (online, 30 April 2020) <https://www.theaustralian.com.au/business/legal-affairs/judges-cut-holidays-to-clear-backlog-of-jury-trials/news-story/976f59830998b6edd4d2785979272d61>.
(36) Ibid.

(37) Interview with Professor Michael Legg, UNSW Law, Director of the Law Society of NSW Future of Law and Innovation in the Profession (flip) research stream at UNSW Law, 6 May 2020.

(38) Ibid.

(39) Interview with Dr Peter Cashman, Barrister and Adjunct Professor of Law, UNSW (by email, 11 May 2020).

(40) Interview with Professor Michael Legg, UNSW Law, Director of the Law Society of NSW Future of Law and Innovation in the Profession (flip) research stream at UNSW Law, 6 May 2020.

(41) Law and Justice Foundation, LAW Survey Summary (11 October 2012) < http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/LAW_Survey_Summary_FINAL.pdf>.

(42) Ibid.

(43) Law Council of Australia, The Justice Project Final Report, (Report, August 2018) 26.

(44) Phillip French, Disabled justice: the barriers to justice for persons with disability in Queensland (Queensland Advocacy Incorporated, 2007) 94.

(45) Law Council of Australia, The Justice Project Final Report, (Report, August 2018) 33.

(46) Productivity Commission, Access to Justice Arrangements - Inquiry Report, (Report, 3 December 2014) 385, 738-739.

(47) Law Council of Australia, The Justice Project Final Report, (Report, August 2018) recommendation 2.1.

(48) Interview with Nassim Arrage, Chief Executive, Community Law Australia (by email, 11 May 2020).

(49) Ibid.

(50) Ibid.

(51) National Aboriginal and Torres Strait Islander Legal Services (by email, 8 May 2020).

(52) Interview with Pip Davis, Principal Solicitor of Women's Legal Service NSW (by email, 7 May 2020)

(53) .Interview with Dianne Anagnos, Kingsford Legal Centre, (by email, 7 May 2020).

(54) Prime Minister of Australia, the Hon Scott Morrison MP, 'Update on coronavirus measures (Media Statement, 5 May 2020) <)https://www.pm.gov.au/media/update-coronavirus-measures-050520>.

(55) Interview with Nassim Arrage, Chief Executive, Community Law Australia (by email, 11 May 2020).

(56) Richard Susskind, Online Courts and the Future of Justice (Oxford University Press, 2019).

(57) Interview with Dr Peter Cashman, Barrister and Adjunct Professor of Law, UNSW (by email, 11 May 2020)

(58) .Interview with Professor Michael Legg, UNSW Law, Director of the Law Society of NSW Future of Law and Innovation in the Profession (flip) research stream at UNSW Law (by email, 6 May 2020).

(59) Ibid

(60) .Ibid.

(61) Grollo v Palmer (1995) 184 CLR 348 [29].

(62) John Fairfax Publications Pty Ltd v District Court of New South Wales [2004] NSWCA 324 [18].

(63) Hogan v Hinch (2011) 243 CLR 506.

(64) Professor David Rolph, University of Sydney (8 May 2020).

(65) Quirk v Construction, Forestry, Maritime, Mining and Energy Union (Remote Video Conferencing) [2020] FCA 664.

(66) Quirk v Construction, Forestry, Maritime, Mining and Energy Union (Remote Video Conferencing) [2020] FCA 664 [5].

(67) Federal Court of Australia, Special Measures Information Note 1: Special Measures in Response to COVID-19, 31 March 2020 <https://www.fedcourt.gov.au/__data/assets/pdf_file/0004/62374/SMIN-1-31-March-2020.pdf>.

(68) Peter Cashman and Eliza Ginnivan, 'Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex litigation and Class Actions' (2019) 19 Macquarie Law Journal 2019 39, 56.

(69) Chief Justice Robert S French, 'Procedural Fairness - Indispensable to Justice?' (Sir Anthony Mason Lecture, The University of Melbourne Law School, 7 October 2010) 1.

(70) Stead v State Government Insurance Commission [1986] HCA 54 [8].

(71) Lee v The Queen (1998) 195 CLR 594 [32].

(72) Capic v Ford Motor Company of Australia Limited (Adjournment)[2020] FCA 486 (Perram J).

(73) ASIC v GetSwift Limited [2020] FCA 504 (Lee J).

(74) Capic v Ford Motor Company of Australia Limited (Adjournment) [2020] FCA 486 (Perram J) [20].

(75) ASIC v GetSwift Limited [2020] FCA 504 (Lee J) [33]

(76) .Capic v Ford Motor Company of Australia Limited (Adjournment) [2020] FCA 486 (Perram J) [19]; ASIC v GetSwift Limited [2020] FCA 504 (Lee J) [33].

(77) David Quince v Annabelle Quince [2020] NSWSC 326 (Sackar J)

(78) .Ibid [29].

(79) Ibid [19]-[20].

(80) Capic v Ford Motor Company of Australia Limited (Adjournment) [2020] FCA 486 (Perram J) [25]; ASIC v GetSwift Limited [2020] FCA 504 (Lee J) [35].

(81) Interview with Professor Michael Legg, UNSW Law, Director of the Law Society of NSW Future of Law and Innovation in the Profession (flip) research stream at UNSW Law, 6 May 2020.

(82) Interview with Dianne Anagnos, Principal Solicitor of Kingsford Legal Centre (by email, 7 May 2020).

(83) Interview with Professor Michael Legg, UNSW Law, Director of the Law Society of NSW Future of Law and Innovation in the Profession (flip) research stream at UNSW Law, (by email, 6 May 2020).

(84) Productivity Commission, Report on Government Services 2019, Part C Section 7: Courts, Courts Interpretive Material (Report, January 2020) 7.12.

(85) Productivity Commission, Report on Government Services 2019, Part C Section 7: Courts (Report, January 2020) Figure 7.4.

(86) Federal Court of Australia, Annual Report 2019-2019: Part 3 The Work of the Court in 2018-2019 (Report, 2019) 26.

(87) Productivity Commission, Access to Justice Arrangements - Inquiry Report, (Report, 3 December 2014) 385.

(88) Richard Coverdale, 'Postcode Justice – Rural and Regional Disadvantage in the Administration of the Law in Victoria' (2011) 16(1) Deakin Law Review 156.

(89) Nicola Berkovic, 'Judges cut holidays to clear backlog of jury trials', The Australian (online, 30 April 2020) <https://www.theaustralian.com.au/business/legal-affairs/judges-cut-holidays-to-clear-backlog-of-jury-trials/news-story/976f59830998b6edd4d2785979272d61>.

(90) Ibid.

(91) Ibid.

(92) Australian Constitution s 80.

(93) Kingswell v R (1985) 159 CLR 264 [298]-[302] (Deane J).

(94) Ibid.

95) Note that the Supreme Court of NSW has stated new jury trials will recommence from 29 June 2020, see: Supreme Court of New South Wales, NSW Supreme Court Moves Towards Resuming Face-to-Face Hearings, 20 May 2020 <https://www.lawsociety.com.au/sites/default/files/2020-05/Media%20release_NSW%20Supreme%20Court%20moves%20towards%20resuming%20face-to-face%20hearings_200520%20.pdf>.

(96) Note the Supreme Court of Queensland has stated it is likely jury trials will be resumed, with limitations and precautions, in the second half of 2020, see: Supreme Court of Queensland, Notice to Legal Practitioners in relation Criminal Proceedings during the COVID-19 Pandemic, 21 May 2020 <https://www.courts.qld.gov.au/__data/assets/pdf_file/0006/650373/sdc-notice-to-practitioners-criminal-proceedings-during-covid-19-pandemic.pdf>

(97) Supreme Court Act 1933 (ACT) s 68BA.

(98) UD v The Queen [2020] HCATrans 59 (29 April 2020) <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans//2020/59.html>.

(99) National Aboriginal and Torres Strait Islander Legal Services (by email, 8 May 2020).

(100) Interview with the Hon Marcia Neave AO (by phone, 7 May 2020).

(101) See for example, Geoffrey Robertson, 'Coronavirus has stopped trials by jury, and that's not necessarily a bad thing', The Guardian (online, 26 April 2020) <https://www.theguardian.com/commentisfree/2020/apr/26/coronavirus-judges-trial-by-jury-justice>.

(102) Adam Cooper, 'Judge-only trials welcomed but lawyers say more appeals are likely', The Age (online, 24 April 2020) <https://www.theage.com.au/national/victoria/judge-only-trials-welcomed-but-lawyers-say-more-appeals-are-likely-20200424-p54n06.html>.

(103) Emily Olle, 'Coronavirus lockdown results in 75 per cent increase in domestic violence google searches', 7news.com.au (online, 31 March 2020) <https://7news.com.au/lifestyle/health-wellbeing/coronavirus-lockdown-results-in-75-per-cent-increase-in-domestic-violence-google-searches-c-901273>.

(104) Rick Morton, 'Family violence increasing during COVID-19 lockdown', The Saturday Paper (online, 4 April 2020) <https://www.thesaturdaypaper.com.au/news/law-crime/2020/04/04/family-violence-increasing-during-covid-19-lockdown/15859188009641>.

(105) Interview with the Hon Marcia Neave AO (by phone, 7 May 2020).

(106) Pip Davis, Women's Legal Service NSW, 7 May 2020.

(107) See Federal Circuit Court of Australia and Family Court, Joint Practice Direction 3 of 2020: The COVID-19 List, 28 April 2020, 1 <http://www.familycourt.gov.au/wps/wcm/connect/e9de660a-a9b7-4407-8643-ca38753a53a6/JPD+3+of+2020+-+COVID-19+List.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-e9de660a-a9b7-4407-8643-ca38753a53a6-n73Lksl>.

(108) See Federal Circuit Court of Australia and Family Court, Joint Practice Direction 3 of 2020: The COVID-19 List, 28 April 2020, 3, 4.

(109) Interview with Pip Davis, Women's Legal Service NSW, (by email, 7 May 2020).

(110) Ibid.

(111) 'Coronavirus and the Courts', Judicial College of Victoria (Web Page, 7 May 2020) <https://www.judicialcollege.vic.edu.au/news/coronavirus-and-courts#Federal>.

(112) 'Offices of the Registry', High Court of Australia (Web Page) <https://www.hcourt.gov.au/registry/offices-of-the-registry>.

(113) Transcript of Proceedings, Cumberland v The Queen [2020] HCATrans 49 <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans//2020/49.html>.

(114) 'COVID-19: Court Updates' Federal Court of Australia (Notice on Web Page, 17 March 2020) <https://www.fedcourt.gov.au/news-and-events/covid-19#17_3>.

(115) Federal Court of Australia, Special Measures Information Note 1: Special Measures in Response to COVID-19, 31 March 2020 <https://www.fedcourt.gov.au/__data/assets/pdf_file/0004/62374/SMIN-1-31-March-2020.pdf>.

(116) Federal Court of Australia, Special Measures Information Note 2: Special Measures in Response to COVID-19 Admiralty and Maritime, 1 April 2020 <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/smin-2.pdf>.

(117) Federal Court of Australia, Special Measures Information Note 3: Appeals and Full Court Hearings, 7 April 2020 <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/smin-3.pdf>.

(118) Federal Court of Australia, Special Measures Information Note 1: Special Measures in Response to COVID-19, 31 March 2020, para 1.2; Federal Court of Australia, Special Measures Information Note 3: Appeals and Full Court Hearings, 7 April 2020, para 1.2.

(119) Federal Court of Australia, National Practitioners and Litigants Guide to Online Hearings and Microsoft Teams, 2 April 2020, para 1.1.

(120) Federal Court of Australia, Special Measures Information Note 1: Special Measures in Response to COVID-19, 31 March 2020, para 9.4.

(121) Federal Court of Australia, Special Measures Information Note 1: Special Measures in Response to COVID-19, 31 March 2020, para 10.

(122) Federal Court of Australia, Special Measures Information Note 1: Special Measures in Response to COVID-19, 31 March 2020, para 4.

(123) Federal Court of Australia Act 1976 (Cth) ss 47A, 47B; 'Videoconferencing', Federal Court of Australia (Web Page, October 2016) <https://www.fedcourt.gov.au/online-services/videoconferencing-guide>

(124) Federal Court of Australia Act 1976 (Cth) s 47C.

(125) Federal Court of Australia ACt 1976 (Cth) s 47C.

(126) Commissioner of Taxation v Seymour [2015] FCA 320, [66] (Buchanan J).

(127) See 'Videoconferencing', Federal Court of Australia (Web Page, October 2016) paras 3.10–3.12; Federal Court of Australia 'Charging for Use of Videoconferencing' (Chargesheet, June 2013) <https://www.fedcourt.gov.au/__data/assets/pdf_file/0019/21871/VCFchargesheet-June-2013.pdf>.

(128) 'Videoconferencing', Federal Court of Australia (Web Page, October 2016) para 1.7.

(129) Judicial College of Victoria, 'Capic v Ford Motor Company of Australia Ltd (Adjournment) [2020] FCA 486' (Case Summary, April 2020) <https://www.judicialcollege.vic.edu.au/sites/default/files/2020-04/JCV%20Case%20Summary%20-%20Capic%20v%20Ford%20Motor%20Company%20of%20Australia%20Ltd%20%28Adjournment%29%20%5B2020%5D%20FCA%20486.pdf>.

(130) Capic v Ford Motor Company of Australia Ltd (Adjournment) [2020] FCA 486, [25]

(131) Federal Circuit Court of Australia and Family Court, Joint Practice Direction 3 of 2020: The COVID-19 List, 28 April 2020.

(132) Ibid [B]

(133) Ibid [1].

(134) Ibid [18].

(135) Federal Circuit Court of Australia and Family Court, Joint Practice Direction 2 of 2020: Special Measures in Response to COVID-19, 31 March 2020, para 2 <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/f98cb354-a247-4c71-bab1-ca767235922e/JPD+2+of+2020+-+efiling+subpoenas+signatures+fees+310320.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-f98cb354-a247-4c71-bab1-ca767235922e-n4OGkxj>.

(136) Federal Circuit Court of Australia and Family Court, Joint Practice Direction 2 of 2020: Special Measures in Response to COVID-19, 31 March 2020, para 3.

(137) Federal Circuit Court of Australia and Family Court, Joint Practice Direction 2 of 2020: Special Measures in Response to COVID-19, 31 March 2020, paras 9–11.

(138) Matthew Doran, 'Coronavirus Concerns See Family Courts Rush through Applications Linked to COVID-19', ABC (online, 25 April 2020) <https://www.abc.net.au/news/2020-04-25/family-courts-to-fast-track-cases-coronavirus/12184498>. See also Amy Remeikis, 'Australia's Family Court to Fast-Track Coronavirus Lockdown-Related Cases', The Guardian (online, 27 April 2020) <https://www.theguardian.com/world/2020/apr/27/australias-family-court-to-fast-track-coronavirus-lockdown-related-cases>.

(139) See Supreme Court of the Australian Capital Territory, Practice Direction 1 of 2020: Special Arrangements in response to COVID 19, 7 April 2020 <https://www.courts.act.gov.au/__data/assets/pdf_file/0004/1513273/Covid-Practice-Directon-1-of-2020-7-April.pdf>.

(140) Ibid [7]-[8].

(141) Ibid [20], [22].

(142) Ibid [20]-[22].

(143) Ibid [18], [25].

(144) Ibid [19].

(145) Ibid.

(146) Ibid [27]-[28].

(147) Ibid [29].

(148) Ibid.

(149) Ibid [5].

(150) Ibid [23].

(151) Ibid [24].

(152) Ibid [3].

(153) Supreme Court of the Australian Capital Territory, 'Order under s 50 Court Procedures Act 2004' (Order, 31 March 2020) <https://www.courts.act.gov.au/__data/assets/pdf_file/0011/1507970/200331-ORDER-s-50-Court-Procedures-Act-2004.pdf>.

(154) Ibid.

(155) Ibid.

(156) Supreme Court of New South Wales, Arraignments List - Procedural Directions, 15 April 2020 <http://www.supremecourt.justice.nsw.gov.au/Pages/coronavirus_covid19_announcement.aspx>.

(157) Ibid [1].

(158) Ibid [2].

(159) 'Variations to Procedures in the Supreme Court', New South Wales Bar Association (Web Page, 9 April 2020) <https://nswbar.asn.au/the-bar-association/publications/inbrief/view/08b347d11316f1372f3414b4c40b9afd>.

(160) Ibid [4].

(161) Supreme Court of New South Wales, COVID-19 - Changes to Court Operations, 23 March 2020 <http://www.supremecourt.justice.nsw.gov.au/Pages/coronavirus_covid19_announcement.aspx>.

(162) Ibid.

(163) Supreme Court of New South Wales, NSW Supreme Court Moves Towards Resuming Face-to-Face Hearings, 20 May 2020 <https://www.lawsociety.com.au/sites/default/files/2020-05/Media%20release_NSW%20Supreme%20Court%20moves%20towards%20resuming%20face-to-face%20hearings_200520%20.pdf>.

(164) Ibid.

(165) Ibid.

(166) Supreme Court of New South Wales, COVID-19 - Changes to Court Operations, 23 March 2020 <http://www.supremecourt.justice.nsw.gov.au/Pages/coronavirus_covid19_announcement.aspx>.

(167) Supreme Court of New South Wales, Arraignments List - Procedural Directions, 15 April 2020 [17]-[18].

(168) Supreme Court of the Northern Territory, Notice #4 to Practitioners, Litigants and the Visiting Public - COVID-19, 31 March 2020 [2].

(169) Supreme Court of the Northern Territory, Notice #2 to Practitioners, Litigants and the Visiting Public - COVID-19, 20 March 2020 [5].

(170) Ibid [3].

(171) Supreme Court of the Northern Territory, Notice #3 to Practitioners, Litigants and the Visiting Public - COVID-19, 25 March 2020 [3].

(172) Ibid [1].

(173) Ibid [4].

(174) Supreme Court of Queensland, COVID-19 Response - Supreme Court <https://www.courts.qld.gov.au/courts/supreme-court/covid-19-response-supreme-court>.

(175) Supreme Court of Queensland, Protocol for Applications, 21 May 2020 <https://www.courts.qld.gov.au/__data/assets/pdf_file/0007/650374/sc-protocol-for-applications.pdf>.

(176) Supreme Court of Queensland, Notice to Legal Practitioners in relation to the COVID-19 Pandemic, 18 March 2020 <https://www.courts.qld.gov.au/about/news/news233/2020/notice-to-legal-practitioners-in-relation-to-the-covid-19-pandemic>.

(177) Supreme Court of Queensland, New jury trials suspended for the immediate future, 16 March 2020 <https://www.courts.qld.gov.au/about/news/news233/2020/new-jury-trials-suspended-for-the-immediate-future>.

(178) Supreme Court of Queensland, Notice to Legal Practitioners in relation Criminal Proceedings during the COVID-19 Pandemic, 21 May 2020 <https://www.courts.qld.gov.au/__data/assets/pdf_file/0006/650373/sdc-notice-to-practitioners-criminal-proceedings-during-covid-19-pandemic.pdf>.

(179) Courts Administration of South Australia, Practice Note: Witnessing of Affidavits during COVID-19 Supreme Court, District Court and Magistrates Court, 16 April 2020.

(180) Courts Administration of South Australia, COVID-19 Update - Avoiding Attendance at Registries and Filing of Documents, 27 March 2020.

(181) Courts Administration of South Australia, Supreme Court Practice changes - COVID 19, 24 March 2020.

(182) Ibid.

(183) Ibid.

(184) Ibid.

(185) Ibid.

(186) Courts Administration of South Australia, Supreme Court Practice Changes - COVID 19, 24 March 2020.

(187) Supreme Court of Victoria, Supreme Court Changes in Response to COVID-19, 20 March 2020 <https://www.supremecourt.vic.gov.au/news/supreme-court-changes-in-response-to-covid-19>.

(188) Ibid.

(189) Ibid.

(190) Supreme Court of Victoria, Notice to the Profession - Practice Court (Common Law) - COVID-19, 16 April 2020 <https://www.supremecourt.vic.gov.au/sites/default/files/2020-04/Notice%20to%20the%20Profession%20-%20Practice%20Court%20-%20Common%20Law.pdf>.

(191) Supreme Court of Victoria, Notice to the Profession - Urgent Applications in the Commercial Court - COVID-19, 16 April 2020 <https://www.supremecourt.vic.gov.au/sites/default/files/2020-04/Notice%20to%20the%20Profession%20-%20Commercial%20Court%20urgent%20matters.pdf>

(192) Supreme Court of Victoria, Supreme Court Changes in Response to COVID-19, 20 March 2020 <https://www.supremecourt.vic.gov.au/news/supreme-court-changes-in-response-to-covid-19>.

(193) Supreme Court of Victoria, Common Law Division Changes in Response to COVID-19, 23 March 2020 <https://www.supremecourt.vic.gov.au/law-and-practice/areas-of-the-court/common-law-division/CLD-changes-COVID-19>.

((194) Supreme Court of Victoria, Fast-tracking Homicide Matters into the Supreme Court, 25 March 2020 <https://www.supremecourt.vic.gov.au/news/fast-tracking-homicide-matters-into-the-supreme-court>.

(195) Supreme Court of Western Australia, Updated Public Notice - COVID-19, 18 March 2020 <https://www.supremecourt.wa.gov.au/_files/Speeches/2019/COVID-19UpdatedNotice(including%20Court%20of%20Appeal)18March2020.pdf>.

(196) Supreme Court of Western Australia, Updated Public Notice - COVID-19, 15 May 2020 <https://www.supremecourt.wa.gov.au/_files/Speeches/2020/COVID-19NoticeUpdate6-15May2020.pdf>.

(197) Supreme Court of Western Australia, Updated Public Notice - COVID-19, 15 May 2020 <https://www.supremecourt.wa.gov.au/_files/Speeches/2020/COVID-19NoticeUpdate6-15May2020.pdf>.

(198) Ibid.

(199) Ibid.

(200) Supreme Court of Western Australia, Updated Public Notice - COVID-19, 18 March 2020 <https://www.supremecourt.wa.gov.au/_files/Speeches/2019/COVID-19UpdatedNotice(including%20Court%20of%20Appeal)18March2020.pdf>.

(201) Ibid.

(202) Supreme Court of Western Australia, Updated Public Notice - COVID-19, 15 May 2020 <https://www.supremecourt.wa.gov.au/_files/Speeches/2020/COVID-19NoticeUpdate6-15May2020.pdf>.

(203) Supreme Court of Western Australia, Updated Public Notice - COVID-19, 15 May 2020 <https://www.supremecourt.wa.gov.au/_files/Speeches/2020/COVID-19NoticeUpdate6-15May2020.pdf>.

(204) Supreme Court of Western Australia, Updated Public Notice - COVID-19, 15 May 2020 <https://www.supremecourt.wa.gov.au/_files/Speeches/2020/COVID-19NoticeUpdate6-15May2020.pdf>.

(205) Supreme Court of Western Australia, Updated Public Notice - COVID-19, 18 March 2020 <https://www.supremecourt.wa.gov.au/_files/Speeches/2019/COVID-19UpdatedNotice(including%20Court%20of%20Appeal)18March2020.pdf>.

(206) Supreme Court of Western Australia, Updated Public Notice - COVID-19 - Criminal Trials, 6 April 2020 <https://www.supremecourt.wa.gov.au/_files/Speeches/2020/COVID-19NoticeUpdate5.1CriminalTrials6April2020.pdf>.

(207) Ibid.

(208) Supreme Court of Tasmania, Circular to Practitioners No 5 of 2020: COVID-19 - Approved Manner of Court Proceedings, 17 April 2020 <https://www.supremecourt.tas.gov.au/publications/covid-19-information-for-court-users/>.

(209) Supreme Court of Tasmania, Practice Direction No 3 of 2020: New Arrangements relating to COVID-19, 24 March 2020 <https://www.supremecourt.tas.gov.au/wp-content/uploads/2020/03/New-Arrangements-Relating-to-COVID-19.pdf>.

(210) Ibid.

(211) Ibid.

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