



Law Council
OF AUSTRALIA

Challenges and opportunities for the legal profession in the midst of COVID-19

Speech delivered virtually by Dr Jacoba Brasch QC, President,
Law Council of Australia at the Hong Kong 2021 Opening of the
Legal Year Presidents' Roundtable.

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Thank you, Melissa and Philip, and to the Law Society of Hong Kong and the Hong Kong Bar Association. I am delighted to take part in this Roundtable to mark the Opening of the Legal Year in Hong Kong.

There is no doubt as leaders of law societies, bar associations and regional organisations, we are representing the legal profession at a critical juncture.

Assuming the role of President of the Law Council of Australia in the midst of the COVID-19 pandemic, I feel a great sense of responsibility – to respond to the needs of Australia’s legal profession in the ‘COVID-era’, and to maintain the administration of justice and continuity of access to legal assistance in our communities.

I would like to take this opportunity to acknowledge my predecessor, Ms Pauline Wright for her extraordinary leadership through the unprecedented challenges of 2020. She did a magnificent job, largely by Zoom, in advocating for the improvement of the law, of the administration of justice, and upholding the rule of law. I thank her.

The COVID-19 pandemic marks an undeniable paradigm shift for the legal sector. At the same time, we know that demand for – and the importance of – accessible legal assistance is heightened in times of crisis. Equally, crisis proffers no excuse for any diminution in our role as defenders and promoters of the rule of law.

This paradigm shift presents countless challenges – but each of these challenges also provides opportunity to innovate, and to create a legal sector able to respond to the contemporary environment.

Few could have predicted the rapid digital transformation of Australia’s legal sector over the past twelve months – much of which was achieved in a matter of weeks between March and April.

The imperative to maintain the administration of justice during the COVID-19 pandemic compelled courts to scale up online registry services, expand virtual hearings and the use of online mediation. It also paved the way to secure critical funding to invest in court infrastructure and technologies – resources which were long overdue.

A critical element in adapting to this new normal was the swift passage of legislation permitting the electronic execution of documents – to enable affidavits to be sworn and witnessed without requiring clients and lawyers to meet face-to-face, and critically, to ensure wills could be made when access to hospitals and aged care homes was restricted.

Where appropriate, the Law Council of Australia sought to advocate for uniformity across the jurisdictions in recognising the validity of documents executed via electronic means.

Faced with the challenge of handling a sharp rise in matters involving family violence and managing urgent parenting disputes arising from border closures, the Family Court of Australia and Federal Circuit Court of Australia moved quickly to establish a dedicated COVID-19 List.

This enables cases which meet the eligibility criteria to be diverted for triage by a dedicated Registrar, who assesses the needs of a case and allocates it to be heard by a judge within 72 hours.

The List has been most successful, and the model has the potential to be adapted by courts to ensure that urgent matters are resolved quickly and efficiently – even after the COVID-19 pandemic.

Another development is the potential for online legal services and dispute resolution to simplify court procedures, eliminate unnecessary and expensive formal correspondence, and considerably reduce litigation costs.

Even more exciting – given the considerable size of our country - is the scope of these technologies to transform the ways in which people living in rural and remote areas access legal advice and representation and enhance their ability to protect and defend their rights.

At the same time, however, this ‘digital revolution’ brings inherent challenges – not least – to maintain the quality of justice and ensure that we do not lose the community-wide advantages of the face-to-face delivery of justice.

Moreover, we must mitigate the risks of ‘digital exclusion’ of those with limited access to technology, unreliable internet connections, or limited IT literacy.

Working remotely also produces new challenges for practitioners to safeguard client confidentiality, to keep sensitive information secure, and abide with regulatory and ethical obligations.

The payoff, however, is an opportunity to drive increased efficiency in the legal sector and enable legal professionals to work more flexibly. It is my hope that the ‘new normal’ of working from home, will allow lawyers with, say, family carer responsibilities, to remain in practice rather than leave with those two roles previously being incompatible.

The Law Council of Australia, together with the assistance of its Constituent Bodies, specialist committees, working groups and sections, is engaging in a comprehensive review of COVID-19 response measures, with a view to identifying those that have had a positive impact on the profession and the progression of legal matters.

We have also mapped procedural reforms introduced by the Australia’s federal courts and are presently considering whether certain temporary measures ought to be extended or made permanent.

Recognising that many of these practical challenges to the continued administration of justice are challenges shared by us all, I look forward to learning about the legislative amendments, procedural and technological solutions that have been implemented in your jurisdictions to effectively respond to COVID-19.

I wish to turn to what I consider the greatest challenge, and most important role, for law societies and bar associations in the pandemic context – [and this is] our shared purpose to ensure trust in the rule of law.

Independent law societies and bar associations realise this role in several ways:

First, by supporting the development of COVID-19 response measures that are consistent with rule of law principles and ensuing compliance with constitutional requirements and human rights obligations.

Second, by monitoring the practical implementation of law and policy, and guard against discrimination and unfairness.

And third, and perhaps most importantly, the insistence upon transparency and accountability of government.

There is no doubt that the imperative to respond decisively to the serious threat to public health posed by COVID-19 pandemic is a legitimate objective that necessitates the use of extraordinary and unprecedented powers.

In Australia, Federal, State and Territory legislatures expedited legislative processes and reduced Parliamentary sitting days, limiting the time in which bills can be analysed and debated, and restricting opportunities for the opposition to hold the government to account.

At the same time, the Executive has invoked emergency powers, and increased the use of Ministerial discretion and delegated legislation – tools which may be justifiable to respond to the challenge at hand, but these practices and the regulations and decisions made under them – should be subject to appropriate scrutiny and review.

For these reasons, the Law Council of Australia welcomed the establishment of a Senate Select Committee by the Federal Government – whose remit is to examine all aspects of the Federal Government's COVID-19 response – having been given broad terms of reference and two years to present a final report – and to which the Law Council of Australia provided an extensive submission.

One area of concern during 2020 was a move by jurisdictions to suspend jury trials, thus limiting the right to request a jury trial in eligible cases.

Recognising the fundamental importance of juries in realising the right to a fair trial, the Law Council of Australia firmly maintained that the right to a jury trial must be retained for all offences prosecuted on indictment – unless the accused consents to be tried by judge alone.

I note here that most Australian jurisdictions have recommenced jury trials and minimised the health risks with mask and physical distancing requirements, as well as procedural modifications that restrict the handling of items by jurors.

In evaluating legislative, executive, and judicial responses to the COVID-19 pandemic, the Law Council of Australia's advocacy draws upon the fundamental proposition that emergency measures must be necessary, reasonable and proportionate to the threats posed by COVID-19, and should not outlast the pandemic.

At first glance, functions of an independent Bar co-exist uneasily in the context of the pandemic and may seem difficult to reconcile.

On the one hand, we engage constructively and in good faith with governments to assist and support the COVID-19 response, confident that good, practical laws and policies are achievable in the context of the pandemic.

On the other hand, we have a responsibility to ensure that governments fulfil their obligations to maintain the rule of law and to respect, protect and uphold human rights.

I am assured, however, we as bar leaders, and the law societies and bar associations we represent, achieve this responsibility with courage, integrity, respect and good judgement – and fulfil our duty to protect the rights of the communities we represent.

Thank you.

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