

Principles for Facilitating
Access to Justice for
Marginalised and Vulnerable
Groups as a Result of the
COVID-19 Pandemic

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INTRODUCTION: RISKS, CHALLENGES, OPPORTUNITIES

Marginalised groups face formidable systemic and personal barriers in accessing justice.¹ This is despite the fact that these groups are disproportionately represented in the legal system, often being more vulnerable to multiple civil and criminal legal problems and having greater and more complex legal needs than the general population.²

The COVID-19 pandemic has seen the introduction by Australian governments of far-reaching public health and emergency management responses, including in the form of restrictions on gatherings and movement. The community has been required to adapt to a new reality based around social distancing, and to new restrictions on gatherings and movement.

The COVID-19 pandemic has also seen the rapid introduction of remote hearings by Australian courts and tribunals. By mid-March 2020, most courts were moving to delay hearings in all but the most urgent cases. Subsequently, most Australian courts have begun to utilise digital solutions to allow remote or 'virtual' hearings. As noted by McIntyre, Olijnyk and Pender, 'the speed with which the judiciary and the profession have managed to adjust to the digital-only landscape is striking.'³

These public health and emergency management responses, and the movement to online courts and dispute resolution mechanisms, have presented particular risks and challenges, as well as opportunities for the delivery of justice to marginalised and vulnerable groups. In terms of risks and challenges, COVID-19 has significantly impacted the availability and delivery of legal and justice services in the community. Public health and emergency management restrictions on gatherings and movement have made it more difficult for the legal system to reach people at risk, whilst at the same time increasing the need for marginalised and vulnerable groups to have effective access to legal advice, representation and oversight in order to ensure the protection of their rights. COVID-19 has also tested the principle of open justice in Australia, with the rapid shift to online or 'virtual' courts and tribunals curtailing the ability of the general public and the media to access hearings.

MARGINALISED AND VULNERABLE GROUPS OF PARTICULAR CONCERN

The Law Council has identified the following marginalised and vulnerable groups as of particular concern in relation to legal and justice service delivery as a result of COVID-19:

- people experiencing legal problems which are likely to be exacerbated by the pandemic or by the restrictions on gatherings and movement, such as people experiencing family violence;
- people with less ability to adapt to legal services moving online, including people with poor legal knowledge, particular language or communication needs, cognitive impairment or mental health conditions, or limited technological capability or access;
- people living in regional, rural and remote areas where legal services or courts have been cancelled (for example, bush courts), or for whom travelling to obtain legal services or attend court has been made impossible, or significantly more difficult or unsafe (for example, fewer flight routes, remote communities closures, State and Territory border closures);
- Aboriginal and Torres Strait Islander persons in locked down remote communities, people in group homes, and people in closed residential settings (for example, prisons, juvenile detention centres, aged care facilities, residential disability settings, residential psychiatric settings, and immigration detention) who are at greater risk of neglect, abuse and exploitation due to fewer visits, decreased access to legal advice and decreased independent oversight.

¹ Law Council of Australia, 'Overarching Themes', *The Justice Project Final Report* (August 2018) 6.

² *Ibid.*

³ Joe McIntyre, Anna Olijnyk and Kieran Pender, 'Courts and COVID-19: Challenges and Opportunities in Australia', *Australian Public Law* (online, 4 May 2020).

ISSUES OF PARTICULAR CONCERN

The Law Council has identified the following particular issues in relation to access to justice for marginalised and vulnerable groups as a result of COVID-19.

Use of technology

As noted by McIntyre, Olijnyk and Pender,⁴ in the last decade online dispute resolution (ODR) systems and techniques have begun to transition from the private sphere into the public dispute resolution system. Jurisdictions internationally are beginning to consider the possibilities presented by ODR, and some have adopted ODR systems. As at May 2020, perhaps the most established of these public ODR systems is the Civil Resolution Tribunal in British Columbia. The United Kingdom is reportedly investing nearly A\$2 billion in digital justice solutions, including a proposed Online Solutions Court. Australian examples of ODR include initiatives in the Victorian Civil and Administrative Tribunal.⁵

The Law Council considers it critical that moves towards online courts and online dispute resolution initiatives generally, and technological responses to the delivery of legal and justice services driven by COVID-19 in particular, take into account the digital exclusion of people who have limited access to technology and reliable internet connections, or lack the skills to utilise technology and online services. These include older persons, people experiencing homelessness or poverty, and people living in regional, rural and remote areas.

Online proceedings can adversely impede communication by and amongst participants, and add to existing stress, particularly where technology is deficient or unreliable. This can affect justice outcomes. Research indicates that online criminal proceedings can be dehumanising for the accused.⁶ The outcomes of civil applications by asylum seekers can also be adversely affected, according to one US study.⁷

The Law Council recognises that face-to-face delivery of justice has inherent community-wide advantages which can be lost in a wholesale move to online proceedings. For courts and tribunals, a face-to-face local presence can help to combat mistrust of the justice system, to provide a tangible reminder of the law in operation, to engage local communities, and to foster local respect for the law. Face-to-face relationships between legal advisors and marginalised and vulnerable communities are often crucial in building trust and respect, both of which are important in securing positive justice outcomes. This is particularly true for clients who have experienced significant trauma, including trauma related to their experience of authorities (for example, Aboriginal and Torres Strait Islander peoples and asylum seekers).

Accordingly, the Law Council considers that legal and justice services must remain human-centred, triage people effectively according to their capabilities, and be provided face-to-face or by telephone where needed. Regard should be had to issues regarding the use of artificial intelligence in service delivery, including the possibility of algorithms being inherently discriminatory.

At all times, principles of open justice must remain paramount.

At the same time, the Law Council recognises that many people within vulnerable cohorts are active and competent users of technology, and that digital engagement amongst such groups has rapidly increased over recent years. COVID-19 has presented opportunities to embrace the advantages of technological innovation.

Research indicates that moves towards online courts and tribunals can have particular benefits in certain circumstances and with respect to specific groups. That is, they can reduce litigation costs, eliminate unnecessary and expensive formal correspondence, simplify procedures, avoid transportation from prisons to courts, and improve safety (for example, for family violence victims).

Overall, the Law Council supports a cautious, evidence-based approach to the delivery of legal and justice services online which takes into account the effects of online proceedings on all participants and takes into account the digital exclusion of many members of marginalised and vulnerable groups.

Increased demand

Public health and emergency management restrictions on gatherings and movement have led to an increase in certain legal problems and a corresponding demand or anticipated demand for particular legal services and courts. For example, there was a documented increase in family violence as States and Territories first entered lockdown.⁸ Legal assistance services already faced insecure and insufficient resourcing prior to the pandemic. COVID-19 exacerbated these difficulties, such as through a lack of basic technological infrastructure to enable staff to work and attend upon clients remotely.

Therefore, the Law Council welcomed the Federal Government's injection of an additional \$63.3 million into frontline legal services to support Australians impacted by the pandemic, announced on 6 May 2020.⁹ \$20 million of this funding will be directed to domestic violence matters; \$29.8 million to other COVID-19 issues; and \$13.5 million to service providers to improve their information technology capabilities as they shift to online service delivery.¹⁰

⁴ Law Council of Australia, *Justice Project - Final Report* (2018), Courts and Tribunals chapter, 77-79; Carolyn McKay, 'Human Rights in Closed Environments' (2015) 37(4) *Sydney Law Review* 617.

⁷ Law Council of Australia, *Justice Project - Final Report* (2018), Courts and Tribunals chapter, 79, citing Susan Banki and Ilan Katz, University of New South Wales Social Policy Research Centre, *Resolving Immigration Status, Part 1: Review of the International Literature* (2009) 3.

⁸ Rick Morton, '[Family Violence Increasing During Covid-19 Lockdown](#)', *The Saturday Paper* (online, 4-10 April 2020).

⁹ Attorney-General, '[Funding Boost to Ensure Struggling Australians Can Get Legal Assistance](#)' (Media Release, 6 May 2020).

¹⁰ *Ibid.*

Increased delays and backlog

The necessary measures implemented by courts and tribunals in response to public health and emergency management restrictions have also resulted in increased delays and a backlog in hearings.

Some marginalised and vulnerable groups were disproportionately impacted in the early weeks of the pandemic when matters were adjourned for uncertain periods. For example, COVID-19 resulted in the suspension of bush courts in the Northern Territory.¹¹ The Law Council notes that some jurisdictions have now begun to publish dates for when ordinary services may resume.¹²

Areas where further delays are likely to have significant mental health and/or human rights impacts include Family Court matters involving children, matters involving offenders being held on remand, and matters involving persons in juvenile detention, immigration detention, or other forms of detention.

Some courts have responded promptly. For example, the Family Court of Australia and the Federal Circuit Court of Australia announced a new court list for quickly dealing with parenting disputes that required urgent attention due to COVID-19.¹³ Examples of applications suitable for the new list include those related to: family violence;¹⁴ supervised contact;¹⁵ border restrictions;¹⁶ and medical reasons.¹⁷ The new list commenced on 29 April 2020 and will be assessed after three months.

PRINCIPLES FOR FACILITATING ACCESS TO JUSTICE FOR MARGINALISED AND VULNERABLE GROUPS AS A RESULT OF THE COVID-19 PANDEMIC

Against this background, the Law Council has adopted the following draft principles for facilitating access to justice for marginalised and vulnerable groups as a result of the COVID-19 pandemic.

1. Immediate responses to the COVID-19 pandemic

- Community representatives, legal assistance services, and courts and tribunals be consulted to identify what measures have been effective to deliver legal and justice services to marginalised and vulnerable groups in the COVID-19 pandemic, which groups have been especially at risk, and what measures might be adopted to facilitate access to justice for those groups going forward towards recovery.
- Legal assistance services, and other critical services such as interpreters, be supported to reach people who may be at greater risk of family violence, neglect, abuse or exploitation as a result of COVID-19, and their ability to do so closely monitored. Groups at risk include: Aboriginal and Torres Strait Islander persons in locked down remote communities; and people in prisons, juvenile detention centres, aged care facilities, residential disability or psychiatric settings, group homes and immigration detention.
- Where required, funding and resourcing be provided to assist courts and tribunals in their efforts to address urgent matters and clear backlogs in trials and hearings which have resulted from COVID-19, especially in priority areas where further delays are likely to have significant mental health and/or human rights impacts. These might include matters involving: children in family proceedings; people on remand; and persons in juvenile, immigration or other forms of detention.

¹¹ Melissa Mackay, 'Justice in remote NT bush courts is 'grinding to a halt', legal group says', *ABC News* (online, 27 April 2020).

¹² Eg, Supreme Court of the Northern Territory, 'Courts and Tribunals COVID-19 Response' (online, 21 April 2020).

¹³ Family Court and Federal Circuit Court, 'The Courts Launch COVID-19 List to Deal with Urgent Parenting Disputes' (Media Release, 26 April 2020).

¹⁴ Where there has been an increase in risk due to the restrictions imposed on families during the pandemic.

¹⁵ Where the current parenting arrangements involve supervised contact and the contact centre is closed.

¹⁶ Where the parties live in different jurisdictions and the child cannot travel between residences due to border restrictions.

¹⁷ Where the parties have tested positive for COVID-19.

2. Long-term framework for reform of legal and justice services as a result of the COVID-19 pandemic

- In all moves to online courts and dispute resolution mechanisms, principles of open justice, access to justice and equality before the law should remain paramount.
- System responses should be developed to cater for a range of likely capabilities, recognising that many people experiencing disadvantage have particular and intensive needs.
- Legal and justice services should respond to the needs of diverse and marginalised groups in the community in a culturally competent, informed, inclusive and accessible manner.
- All reform of legal and justice services should be developed in consultation with, and co-designed by community led organisations and people with lived experiences.

3. Data collection and review arising from the COVID-19 pandemic

- All short-term practices adopted in the delivery of legal and justice services during COVID-19 be the subject of comprehensive evidence-based review prior to their continuation in a post COVID-19 environment
- Evidence be collected in relation to the effectiveness of legal and justice services for marginalised and vulnerable groups during COVID-19, taking into account the experiences and perspectives of different demographic and geographic cohorts. The collection of data be designed to support modelling of critical current and future needs.
- There be significant research to build the evidence base for the delivery of online courts, tribunals and dispute resolution forums for people experiencing disadvantage and with less ability to adapt to legal services moving online. This includes people with poor legal knowledge, language or communication needs, cognitive impairment or mental health conditions, or limited technological capability or access.
- All changes to the delivery of legal and justice services for marginalised and vulnerable groups post COVID-19, including moving more services online, should be approached cautiously and based on a review of the collected data over time, undertaken in stages with stakeholder consultation, and with opportunities to safeguard against unintended consequences.
- Funding of legal and justice services for marginalised and vulnerable groups post COVID-19 be calculated based on the collected data, and in order to ensure that the funding is adequate and sustainable in the long-term.

4. Lessons from the COVID-19 pandemic for the use of technology for marginalised and vulnerable groups in the delivery of legal and justice services

- Face-to-face approaches to the delivery of legal and justice services are likely to continue to be essential for many people in the long term.¹⁸
- Careful consideration and exploration of possible technological responses is needed, asking why and for whom technology may be effective, in what circumstances, and the likely benefits and risks.¹⁹
- Efficiency should not be the only, or main, driver of decisions to implement technological solutions to deliver justice – ensuring fair, equitable and effective access to justice, community engagement with the rule of law, and equality before the law are essential objectives.²⁰
- Technological responses to the delivery of legal and justice services for marginalised groups should be developed in consultation with community organisations and people with lived experiences. Culturally safe, victim-centred or trauma-informed approaches should be prioritised. Consequently, the online delivery of legal and justice services may be inappropriate in particular circumstances and for particular cohorts.
- Technology used to deliver legal and justice services must be accessible and reliable, and the necessary infrastructure available in courts, tribunals and dispute resolution forums across Australian jurisdictions, and in regional, rural and remote areas, in line with the principle of equality before the law.
- Tailored, area-specific planning can help to ensure the delivery of appropriate mixes of online and face-to-face legal services for marginalised groups.
- Moving the delivery of legal and justice services online generally presupposes greater involvement by clients and less oversight by legal practitioners, and can be empowering and convenient for consumers. However, self-help is generally an inappropriate approach for people with poor legal knowledge, particular language or communication needs, cognitive impairment or mental health conditions, or limited technological capability or access.
- Moving the delivery of legal and justice services online can have other justice consequences such as a decrease in independent oversight of institutions; for example, prisons and aged care facilities. Alternative methods of providing independent oversight will need to be developed and provided where face-to-face services are removed.

¹⁸ Law Council of Australia, 'Overarching Themes', *The Justice Project Final Report* (August 2018)

42.

¹⁹ Ibid.

²⁰ Ibid.