



Law Council  
OF AUSTRALIA

# Bar leadership lessons in managing the COVID-19 pandemic's impact

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

11 January 2021

Thank you Brian [Speers].

I am delighted to participate in this Presidents' Roundtable as we mark the Opening of the 2021 Legal Year in Singapore. While I had hoped to meet you all in person, I am grateful to our hosts – the Law Society of Singapore – for arranging this virtual programme and enabling the distinguished leaders of the legal profession in our region to share our experiences, challenges and lessons learned over the past year.

Having assumed the Presidency of the Law Council of Australia in the midst of the COVID-19 pandemic, I look forward not only to today's discussion, but also to come to know each of you and continue these dialogues throughout the year. I firmly believe that through discussion and collaboration with our international counterparts, law societies and bar associations – our Bars – can better support the legal profession in our jurisdictions, as well as the communities we serve.

Before I speak to our lessons learned, I would like to acknowledge my predecessor, Ms Pauline Wright – whom some of you would have met this time last year – for her extraordinary leadership through the 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.

In little more than twelve months, COVID-19 has had a devastating impact across the globe, and it may be years before we are able to measure its true human and economic impact.

To make sense of what I will say about our responses, I will first briefly outline how Australia's federated system and our constitutional framework have shaped government responses to the COVID-19 pandemic. Then I will turn to reviewing Australia's 'COVID experience' more generally.

Australia's Constitution divides powers and responsibilities between the Federal Government on the one hand, and states and territories on the other.

During the pandemic, the Federal Government has exercised its powers to secure external borders, mandate quarantine for international arrivals, and provide economic relief to individuals and businesses.

Meanwhile, the responsibility to implement quarantine programmes falls to state and territory governments.

Under our Constitution, states and territories also bear responsibility for health, education, and policing – so decisions to close internal borders, for example, between my state of Queensland and the state of New South Wales, to mandate the wearing of masks, to close schools and implement curfews, is within their remit.

In turn, different states and territories had different responses to those decisions. This created some difficulties in limiting the spread of COVID-19 both within states and territories, and across borders.

In March 2020, the Ruby Princess cruise ship docked in Sydney Harbour, and its passengers were permitted to disembark before COVID-19 test results were processed. 600 of these passengers later proved to be COVID-positive – seeding outbreaks in other Australian states and territories.

A State Inquiry into the Ruby Princess cruise superspreading incident found that the New South Wales Department of Health bore primary responsibility for the incident, but noted

that the legal framework for cruise ship arrivals divided responsibilities among the State Department of Health, the Commonwealth Department of Agriculture, Water and Environment (responsible for biosecurity), and the Australian Border Force (responsible for immigration) which reports to the Commonwealth Department of Home Affairs.

Our federated system has also shaped the manner in which Australia's bar leaders have responded to the pandemic. And I might also add, Australia, like many other countries, has two arms of the legal profession, barristers, and solicitors, quite irrespective of the existence of the federation.

As the federal body, the Law Council of Australia is primarily concerned with federal COVID-19 legislation and control measures and matters relating to the federal court system. State and territory bars, meanwhile, were best placed to comment on legislation specific to their own jurisdiction and state court responses. But that said, the Law Council of Australia also plays a pivotal role in providing a cohesive and collaborative voice, wherever possible, across the various jurisdictions.

My own practice is mainly in the federal court system, in family law, so, as President-elect last year, I was able to give hands-on experiences and insights to our Executive and Directors about litigating – or trying to litigate - in those federal courts.

Obviously, lockdowns and travel restrictions have affected the operation of the courts and work of the profession to varying degrees in each state and territory, and in the federal courts too.

For example, the ways in which legal professional associations in the state of Victoria have supported the legal profession through the pandemic (and supported the profession very well), in the context of protracted strict lockdowns, has been very different to the needs of, say, the profession in the Northern Territory, which recorded no community transmission.

That said, all approaches by every professional association have been underpinned by the same values and goals

- to ensure that the administration of justice may continue as smoothly as possible,
- that members of our communities have continuity of access to legal services,
- to keep a watchful eye that constraints imposed for health purposes do not encroach upon open and transparent justice,
- and, that legal practitioners are able to weather the pandemic's economic and social impacts as well as possible.

Now, then, what have we learned?

First, at both a federal and state level, the legal profession has shown itself to be remarkably agile, and capable of swiftly adapting to a new landscape.

In the initial pandemic response in March 2020, Australia's legal profession and court systems had a very narrow window to transition to remote service delivery and to identify priority legal services to be maintained.

As a result, a digital transformation, which may otherwise have occurred over several years, surged through our profession in a matter of weeks. The courts too scaled up online registry services and expanded virtual hearings and online mediation.

As a silk specialising in family law and child protection, a defining moment – for which I again congratulate the Chief Justice and Chief Judge of the Family Court of Australia and Federal Circuit Court – was the initiative to establish a dedicated court list dealing exclusively with urgent parenting-related disputes and matters involving a risk of family violence.

For example, if children who live along borders, with one parent in one state and the other parent in another – even though they may only be ten minutes' drive apart – those parents were unable to comply with Orders which required the child to spend time with each of them.

The COVID-19 List was thus designed to quickly identify and deal with cases that need urgent attention due to the COVID-19 crisis. Eligible cases receive immediate attention and are triaged by a dedicated Registrar who assesses the needs of the case and allocates it to be heard by a judge within 72 hours.

It has been an undoubted success.

One of the Law Council of Australia's key initiatives was to establish an Information Sharing Group – comprised of the Attorney-General, federal heads of jurisdiction, President of the Law Council and President of the Australian Bar Association and the Commonwealth Director of Public Prosecutions – and who came together to discuss challenges posed by the pandemic and share procedural and technological solutions.

Throughout the pandemic, the Law Council of Australia's Constituent Bodies – the state and territory bar association and law societies - and specialist sections and committees have consistently risen to the challenge of suggesting necessary amendments, critical resources, and innovative and practical solutions to enable the administration of justice to continue. Many have also supported the profession financially, by either waiving or reducing fees.

And it is the Constituent Bodies who have been leading the charge, ensuring that our profession and those who are working within, are not disadvantaged, but are being looked after in a truly holistic manner.

That ranged from finding innovative ways to support the health and well-being of our profession like e-coffees, introducing online courses, extending timeframes, or lifting the caps on CPDs undertaken as private study.

Online learning is not new, but during COVID-19 it has been embraced by legal educators. While some states and territories postponed or cancelled bar exams and bar practice courses, there has been a greater shift to online learning for future courses.

Universities across Australia transitioned to online learning in March 2020 and remains the default mode of teaching instruction, although, some face-to-face learning has resumed in states and territories where COVID-19 transmission is not occurring in the community.

Supporting legislation to permit electronic document execution and to enable lawyers to comply with regulatory obligations while working remotely has been an important part of adapting to the new landscape.

Electronic document execution was particularly important, so affidavits could still be sworn even if the lawyer and client were apart, and critically, wills could be made. Where appropriate, the Law Council of Australia sought to advocate for uniformity in legislative approaches to the validity of remotely-executed documents via electronic means.

As we enter the second year of the COVID-19 pandemic, law societies and bar associations continue to play a vital role to support and adapt to this rapid transformative change and to identify initiatives and technologies which should outlast the pandemic.

It is my hope that the courts, especially the federal courts, will continue with electronic hearings for Directions Hearing and many interim or interlocutory hearings. We have discovered that the savings to clients are considerable.

The second lesson is that our responsibility to promote and support the development of 'good law' continues even in times of emergency.

Drawing upon the unique skills and expertise of the legal profession, we can offer insights into the practicality, reasonableness and proportionality of proposed legal measures, their consistency with constitutional principles, transparent justice, the rule of law, access to justice, and, to identify responses that may indirectly and disproportionately disadvantage vulnerable groups.

One policy area in which the Law Council of Australia's analysis and advice had a clear impact was in the development of Australia's COVIDsafe smartphone app, created to assist in tracing the spread of COVID-19.

While its potential public health benefit was clear, the Law Council of Australia worked with the Federal Government to ensure that the app's design – and the legislative framework governing its operation – would incorporate necessary safeguards

These included:

- Clear governing legal and administrative frameworks;
- Limitations on the collection and use of personal information to what is strictly necessary for the sole purpose of contact tracing; and
- Robust and appropriately resourced independent oversight.

The app is an example where the Law Council of Australia's priority was to ensure appropriate checks and balances on Executive power, including that the app be grounded in a statutory footing, its operation subject to ongoing Parliamentary scrutiny, and that the Federal Privacy Commissioner be empowered to investigate complaints.

The third lesson is that accountability of the executive and legislative arms of government is perhaps more critical than ever, and independent bars serve a vital purpose to monitor their exercise of powers.

The imperative to respond decisively to the pandemic has led to the use of extraordinary powers, at federal, state and territory levels, increased Ministerial discretion and delegated legislation and expedited legislative processes...and for bar leaders, condensed timeframes in which to make submissions.

As governments ask individuals to make extraordinary sacrifices in this uncertain climate, trust and confidence in leadership has never been more important.

We welcomed the federal government's establishment of a Senate Select Committee, announced in April 2020, to examine the government's response to the coronavirus pandemic. With wide ranging terms of reference, the committee can examine all aspects of the Federal Government's COVID-19 response, and any other 'related matters'.

We provided an extensive submission to the committee and anticipate there will be further opportunities for more targeted consultation on the major themes emerging from initial public hearings.

Each of these lessons speak to the critical role played by the legal profession as custodians of the rule of law.

While grappling with this once-in-a-generation transformative change, I am struck by the fact that legal professionals, law societies and bar associations did not just focus inwards, on serving our clients, but were simultaneously called by our purpose and shared responsibility to look outwards – to maintain scrutiny over the use of extraordinary powers, and to ensure that the rule of law, the separation of powers, and good governance was maintained.

If there is a silver lining to be found in the difficult year behind us – and a reason to be optimistic about the year that lies ahead – it is surely a greater appreciation for the vital role we play.

Thank you.

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