

A successful recovery:
addressing the backlog of
cases in the Federal Courts
as a result of the COVID-19
pandemic

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Law Council
OF AUSTRALIA

Due to the COVID-19 pandemic, the Federal Courts (High Court of Australia (**High Court**), Federal Court of Australia (**Federal Court**), Federal Circuit Court of Australia (**Federal Circuit Court**) and Family Court of Australia (**Family Court**)) have each put in place alternative arrangements for listings and other events that would ordinarily require in person attendance and have had to adjourn or otherwise delay certain hearings where such arrangements are not appropriate or practicable.

The alternative arrangements adopted by the Federal Courts have included shifting operations to Information and Communications Technology (ICT) systems. The Courts have also implemented other measures, including revised registry services. The Law Council commends the Federal Courts for engaging in clear, consistent and constructive communication with the legal profession throughout this process.

As Australia moves into the COVID-19 recovery period, the Law Council will work collaboratively with the Federal Courts to identify common goals and priorities for the administration of justice that both address legacy issues and embrace opportunities to which COVID-19 has given rise. These take into account the challenge of minimising the incidence and impact of the delays in commencing and finalising matters, which may be exacerbated by the concurrent increased demand for court resources in relation to particular matters, such as domestic violence.

The goals and priorities that the Law Council has thus far identified are set out below. They are intended as an indicator of measures that might be priorities and assist in a successful recovery as the restrictions associated with the COVID-19 pandemic are gradually eased.

The Law Council looks forward to continued engagement with the Federal Courts as they continue to review, adapt and develop procedures, processes and systems in response to the COVID-19 pandemic and for the future.

GOALS IN ADDRESSING CASE

BACKLOG

Timely resolution of disputes is a key aspect of the rule of law and of public confidence in the justice system to uphold the law and determine disputes fairly.

Innovative ways to address the backlogs exacerbated by the COVID-19 pandemic continue to be developed. However, when procedures are implemented to address court backlogs, they should not adversely impact on the rights of the parties to natural justice and procedural fairness.

The principles of open justice should remain paramount in any discussion regarding remote hearings. It is desirable that principles and approaches that strike an appropriate balance between remote hearings and the conduct of proceedings in open court be developed.

These might, for example, provide for continued use of remote hearings for directions hearings and many other interlocutory proceedings (subject to a direction of the court to the contrary) but otherwise default to (if not mandate) hearings in a physical, open courtroom.

Any move to increase the reliance on an online justice system should be cautious and evidence-based, factoring in the benefits and disadvantages particular to types of matters and the circumstances of parties and practitioners. For example, online justice delivery 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).

Equally, it can adversely impede communication by and amongst participants and add to existing stress, particularly where technology is deficient or unreliable. Research suggests it can also affect justice outcomes, be dehumanising for criminal accused, and result in adverse outcomes in civil applications by asylum seekers. On addressing these issues, reference should be had to the principles set out in the document issued by the Law Council, entitled [*Principles for Facilitating Access to Justice for Marginalised and Vulnerable Groups as a Result of the COVID-19 Pandemic*](#).

As the justice system continues to embrace videoconferencing and/or teleconferencing remain post-pandemic, there is a need to improve its technological infrastructure with a view to ensuring courtrooms, remote and self-represented litigants and practitioners have access to quality telephone and internet connections. Similarly, there is a need for the Federal Courts and the legal profession to further develop guidance materials and training in areas of:

- technological competency for judicial officers and court staff;
- standard practice directions for the use of technology at all levels;
- guidelines for legal practitioners to ensure that appropriate levels of connectivity are utilised; and
- protocols for practitioners/litigants/witnesses dialling in to remote court events.

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.

Wherever practicable, the following matters should be identified and prioritised:

- matters for which further delays are likely to have significant mental health and/or human rights impacts. These 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; and
- matters which were adjourned for uncertain periods in the early weeks of the pandemic, disproportionately impacting upon some marginalised and vulnerable groups. For example, the pandemic prompted the suspension of bush courts in the Northern Territory.

The Family and Federal Circuit Court's new COVID-19 List for quickly dealing with parenting disputes that require urgent attention due to events arising from the pandemic, involving referral to a national list, triage by registrars and allocation to any available judge in Australia, has significant benefits.

The increases in rates of domestic violence during the COVID-19 pandemic have resulted in additional dangers for the victims of family violence, particularly women and children, and this should continue to be addressed in the running of the list as well as all other practicable measures (such as identification and prioritisation of related matters, wherever practicable). The adoption of national lists in relation to other types of urgent matters, including those outlined above, should also be considered.

Wherever practicable, criminal trials ought be conducted in accordance with the principles set out in the document issued by the Law Council, entitled [*Principles on jury trials in the context of COVID-19*](#).

More judges should be appointed to address chronic under-resourcing particularly, in light of extreme backlogs in migration matters, at Federal Circuit Court level. Appointments serve as a stimulus to the legal profession and should target regional areas.

Public health, and the health of participants in the Federal Courts processes, remain paramount. Despite the above concerns, measures to address backlogs should accord with government health guidelines.

BACKGROUND

In response to the outbreak of COVID-19, declared a pandemic by the World Health Organisation on 11 March 2020, the Federal Courts have introduced restrictions on the conduct of in-person proceedings and services to limit the spread of the virus to court staff and users.

The introduction of these restrictions has been countered by the implementation of measures to enable courts to facilitate the resolution of matters to the extent possible, in particular through ICT means. Across the Federal Court, Family Court and Federal Circuit Court, Microsoft Teams software has been provided to all Judges, Registrars and Family Consultants to allow hearings and trials to take place remotely.

Use of electronic filing systems and Digital Court Files have also been implemented or expanded to ensure that documents can continue to be lodged. All Duty Lists are being conducted through ICT means.

The Federal Courts have also implemented other non-ICT measures, such as new court lists, revised registry services and encouragement of greater use of alternative dispute resolution methods. An important example is the establishment of a Family Court and Federal Circuit Court list dedicated to deal exclusively with urgent parenting-related disputes that have arisen due to the COVID-19 pandemic.

This list was introduced to respond to an increase in the number of urgent applications filed in the Courts over a four-week period in March and April, with a 39 per cent increase in the Family Court of Australia and a 23 per cent increase in the Federal Circuit Court. This list began operating on 29 April 2020.

The Federal Courts have also issued valuable guidance on the special measures they are already taking to continue operation in the face of COVID-19. In the case of the Federal Court, for example, Practice Notes have been issued on the subject of [*Special Measures in Response to COVID-19 \(SMIN-1\) \(Special Measure Information Note\)*](#), and on such measures in the case of appeals and [*Full Court hearings*](#).

The Federal Courts have been chronically under-funded and under-resourced for a substantial period of time (including in respect to under-appointment of judges at the Federal Circuit Court), resulting in extensive delays in commencing and finalising many matters.

Although the measures introduced by the Federal Courts will be critical in limiting the impact of the COVID-19 pandemic on delays and backlogs, it is highly likely that these issues have been, and will continue to be, exacerbated by the health crisis.