



Law Council
OF AUSTRALIA

Access to Justice in a COVID-19 World

Speech delivered by Dr Jacoba Brasch QC, President, Law Council of Australia at the Law Society of Western Australia/UWA Law School CPD Fundraiser presentation.

25 February 2021

The Honourable Robert French AC,

Chief Judge Julie Wager,

Professor, Nicola,

Ladies and gentlemen.

Thank you, Jocelyn and your Executive, for providing me with the opportunity to speak to you all here at the Law Society of Western Australia and University of Western Australia Law School, CPD Fundraiser.

I acknowledge the traditional owners and custodians of Country throughout Australia and recognise their continuing connection to the land, sea, and community. We pay our respects to them and their cultures, and to their Elders past, present and emerging.

When I was first asked to attend this event a little while ago, I did wonder to myself - isn't COVID ancient history for WA (and similarly so-2020 for QLD) ... but then, only last month you had your six day lock down and we, our three days.

Both your state and mine have very recently been reminded how things can change so quickly.

So now I speak to the topic of Access to Justice in a COVID world with, sadly, a new sense of relevance.

Tonight, I will touch on a few topics with broader implications to and observations about our profession, and some of the IT positives that have come from it – if you have IT access. The topics are:

- access to justice in this new normal
- the electronic execution of documents
- new ways to practice; and
- the importance of professional associations

On the last point, I immediately observe that tonight's event – where the WA legal profession, the WA Law Society and University of Western Australia have come together to support the Women's Legal Service WA – this is a prime example of the importance of professional associations working together.

There is no doubt that we have endured a tumultuous 12 months, with COVID influencing each and every one of us in some way. I must admit though that I had a sense of being safe and protected ensconced here in Brisbane, with our hard border closures, perhaps as many of you did in Western Australia.

I also had a Pollyanna expectation that all would be good at the stroke after mid-night on 1 January 2021 – but our respective Januarys were stark reminders that we will be living with this virus, and working around it, for months to come.

Indeed, having assumed the Presidency of the Law Council of Australia in the midst of the COVID-19 pandemic, part of my year will be spent engaging and supporting the profession, as it deals with some monumental changes to the way that we do business and the ways we can continue doing business, whilst also ensuring justice is done and is seen to be done.

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. But, crisis proffers no excuse for any diminution in our role as defenders and promoters of the rule of law.

And let me pause to acknowledge that in times of crisis, the legal profession steps up to the plate – for example, volunteering to assist people in your recent and tragic bushfires, or, in my state, when we had flood waters that ravaged and killed.

In times of crisis, we act in the finest traditions of what the French call, *noblesse oblige*.

Let's stop for a moment and think about how we are convening this evening – you are a 10-hour, expensive return flight away from my hometown of Brisbane. Yet here we are.

This time last year, there would have been little thought to whether I could participate by Zoom; rather, the thinking would have been along traditional lines of physical attendance.

And then COVID hit our shores.

Very quickly, we had to learn a new way of practicing, a new way of living, and a new way of connecting with friends in other locations – and a new ways of assisting our most vulnerable.

Whilst this paradigm shift presented countless challenges – many of these challenges also provided opportunity to innovate, and to create a legal sector able to respond to our new normal – and perhaps most importantly, a legal sector that can look at the last 11 months, and identify efficiencies for how we deliver our services going into the future.

Of course, each state and territory had their own responses to managing the pandemic, with, perhaps, your state and mine being closely aligned in approaches.

Equally, each state and territory law society and bar association also approached their offering to members in their own fit for purpose way.

But 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 key 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.

Last year and continuing now, the legal profession has shown itself to be remarkably agile, and capable of swiftly adapting to new technologies and ways of working.

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.

Research tells us that lawyers are, for the most part, notoriously bad at adopting technologies. However adapt we had too, with perhaps the most uttered phrase of 2020 being “you’re on mute”.

And adapt we did.

At the Law Council, we moved to weekly executive meetings where I too was guilty of not adopting new technologies. For a period of time, I declined to attend by Zoom, but rather, phoned in as we had done for years. Sensing the then President’s increasing frustration with my failure to engage with the tech, I reluctantly yielded, and have since become the biggest convert to Zoom – I bought myself a second monitor, a really good camera and a green screen. An early adopter I was not, but late convert, I certainly am.

When your Law Society President, Jocelyn and I met in January, we met by Zoom, with your CEO David Price beaming in too. Just being able to see someone whilst talking to them, as opposed to what would have been a phone call, added a depth and dimension to our meeting. For my part, it was certainly a warmer discussion than a phone call would have allowed.

Similarly, for our Directors’ meeting in March, a number of Directors and CEOs will beam in via Zoom. Some are physically attending but others, particularly where the travel is long and expensive, and those from states where borders are closed with only short notice, are attending electronically. Three of our four Directors’ meetings last year were held this way.

Whilst we did not enjoy the collegiality of having a chat over a coffee before and after meetings, there was no detractor from the business of the Law Council being conducted with rigorous debate and input from all.

I also give you another specific example of not only adaption, but also the importance of collegiality between professional associations and collaboration with the court.

In early March last year, I was contacted by the CEO of our (my) Qld Women’s Legal Service who told me of children who were not seeing the “other” parent because of COVID restrictions, and, of the increased spike in calls about family violence where people were locked down under one roof unable to escape. I am well aware your Women’s Legal Service – like every counterpart across the nation – has seen an increase in demand for services due to COVID-19.

Back to the QLD example, Angela Lynch the QLD CEO, was able to reach out because of the collegiality we had developed over years. In turn, I asked Angela to put her concerns in writing, addressed to the Chief Justice / Chief Judge, send it to me, and I would ensure it got before him.

By the end of the week, the Family Court of Australia and Federal Circuit Court (FCC) had the COVID-19 list where parenting or family violence matters would be heard expeditiously. And because we were all using new IT platforms for hearings, it did not matter where the national family court COVID judge sat, or the FCC COVID judge – everyone would be on-line and the matter dealt with within 72 hours of filing.

That is a real example of the profession and the courts working together for a truly beneficial outcome for members of our communities in crisis.

It is something we must continue to do – the collegiality and the creative use of technology.

Indeed, in my own practice, even though we can travel freely within the state (touch wood) many clients are now expecting more efficient delivery of legal services. Why would someone (unless they wanted to) drive 2.5 hours each way from say Toowoomba to the west of Brisbane to have a conference with me, and to pay for the privilege of the solicitor doing the same? Why would someone, again, unless they wanted to, pay for me to fly to say Cairns for a mention, when the courts have been able to offer electronic hearings.

Last year, I also conducted an unprecedented number of arbitrations by Zoom, with parties in locations from Cairns, to Adelaide, Sydney and Melbourne, as well as my own Brisbane. I was only talking to solicitors from Melbourne earlier this week about continuing to arbitrate by Zoom even if we can travel, because it will save parties, especially when in varying locations, costs of travel, accommodation, babysitting and disruption to their lives.

I used to be a believer in the “*see the whites of their eyes*” approach to cross-examination. However, even before COVID, I had read a goodly body of research which concluded that determining credit by observation was a flawed methodology, and, I had conducted enough trials by video-link pre-COVID to know (at least in my courts) you in fact get a closer and better view of witnesses by this means.

I hasten to add that I am not a criminal law lawyer, nor do I suggest jury trials could be conducted this way.

On a different topic, in my view, the electronic execution of documents – not just affidavits as I understand to be the case in WA, but for deeds and wills too – was and will remain a game changer. But we need consistency in approach – disputes (like viruses) do not stop at borders.

Of course, we need to ensure against undue influence, unconscionable conduct and turn our mind to issues of capacity, but the electronic execution of documents offers real potential for some aspects of law to be more efficient and cost-effective.

For the upheaval that was 2020, these are potentially positive outcomes and so long as we can ensure fidelity and veracity of the process, they are efficiencies I would like to see remain in place.

It is also my hope that the courts, especially the federal courts where the Law Council has its focus, will continue with electronic hearings for Directions Hearings, mentions and many interim or interlocutory hearings. We have discovered that the savings to clients, both in dollars and convenience, are considerable.

However, while the introduction of technology to legal services, may be seen by some as the answer that non-urban Australian’s have been waiting for, it is not a complete silver bullet.

Technology will not tear down the inequality that exists, where access to the basics of online access is still lacking.

Many years ago, I was volunteering at the QLD Women’s Legal Service. We were rostered on to give advice one night a week every six weeks at the drop-in, no appointment necessary nights. Most of the inquiries were about family law. To one woman asking me about divorce, I replied “*you can download the court forms on-line.*” She looked at me and said, “*but I don’t have a computer.*”

That reality check, 21 years ago, still haunts me today that my middle-class, first world life was not the common, shared experience of everyone in this nation.

It was a salutary reminder to me that we are not, in fact, all equal in accessing the law.

It is a reality that has particularly stuck with me this last year as many of us easily “pivoted” (as the saying goes) to digital services.

But it is not the lived experience of all.

As we forge a path to on-line service delivery where appropriate, we must remember there are the IT rich and the IT poor. That is not to say we forgo the incredible enhancements which on-line service delivery offers many of us; but we just need to be alert to and inclusive of those who do not have:

- ready access to a computer or mobile device;
- good bandwidth;
- language proficiency;
- sufficient levels of literacy;
- adequate levels of IT literacy; and
- an income to support IT access and subscriptions.

In short, we are not all on a level playing field.

And on a separate issue, a closed court system is an anathema to us.

The courts are generally open, and any citizen may enter at any time, just like our parliaments.

Chief Justice Gibbs of the High Court said in *Russell v Russell* that it is the ‘ordinary rule’ of courts of Australia that their proceedings shall be conducted ‘publicly and in open view’; without public scrutiny, ‘abuses may flourish undetected’.

Gibbs J went on to say:

‘Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for ‘publicity is the authentic hall-mark of judicial as distinct from administrative procedure’. To require a court invariably to sit in closed court is to alter the nature of the court.’

That is not to say we should be doing anything other than using technology for the advancement of the provision of legal services and access to justice, but it does mean we need to be conscious of bringing everyone along with us, or at least as many as possible.

But we must not forget the IT poor as they are likely to have a range of vulnerabilities and disenfranchisement.

I invite you all to look at the whole of the person who is your client, and the whole and their needs and circumstances.

Thank you.

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