

21 August 2020

The Hon Will Alstergren
Chief Justice, Family Court of Australia
Chief Judge, Federal Circuit Court
305 William St,
Melbourne VIC 3001

By email: [REDACTED]

Dear Chief Justice,

COVID-19 Measures in the Family Court of Australia and Federal Circuit Court

The Queensland Law Society (QLS) acknowledges the considerable work undertaken by the Family Court and Federal Circuit Court to quickly adapt processes during the COVID-19 pandemic and the extensive consultation undertaken with affected stakeholders. The Courts have been pro-active, responsive and consultative in implementing measures and there is significant utility in many of those measures enduring.

To that end, we have sought feedback from our members, including members of our legal policy committees, about outstanding issues or problems they face in using the Courts at this time, as well as measures they would like to see remain once the effects of the pandemic ease. Overwhelmingly the feedback has been that the Family Court and Federal Circuit Court have coped very well with the crisis.

The issues identified have generally fallen into three broad themes:

- Appearances;
- Court documents; and
- Infrastructure and technology.

Mentions and interim hearings

Members generally found that the ability to conduct interim hearings by telephone or on the papers useful and significantly more efficient than hearings in person.

Conducting mentions and interim hearings by telephone represents significant cost saving for clients. It has avoided the need to wait in Court for up to several hours for a brief appearance. Practitioners are able to remain in the office or at home and continue working on other matters.

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Particularly for practitioners and clients from regional areas, this practice has eliminated the need to travel and costs associated with that travel. It also means that interim hearings could potentially run on days when the circuit judge is sitting in another location and thereby allow for other matters to be heard on circuit days.

QLS members were supportive of matters proceedings in chambers, without the need for any appearances. In these circumstances, parties could still file an outline of argument and respond to any late delivery of affidavit material.

Importantly, in circumstances where a client feels intimidated or fearful of their former partner, the ability to conduct matters in this manner is considerably less stressful. For matters involving domestic and family violence, conducting matters by telephone or on the papers also reduces concerns around safety for clients and practitioners.

For both mentions and hearings, telephone appearances work particularly well when parties have an allocated time for their matter. Members have reported that some practical improvements could be made to the coordination of call overs and trials, particularly with circuits. We suggest that when a matter is listed for trial in a hearing list, it is allocated a number. If a matter resolves prior to the trial commencing, all matters would be moved up in the list. A call over could then be conducted of all listed trials on the morning of the first day and matters then proceed in that order.

Some members raised concern about the impact telephone attendance may have on the ability to facilitate discussion between parties. Previously, attending Court in person could allow for waiting times to be spent usefully discussing possible resolution with the other party.

Overall, however, QLS supports retaining the option of mentions and directions hearings being conducted by telephone and on the papers.

Divorce hearings conducted by phone

Members found that having divorce hearings conducted by telephone was an improvement from the previous practice, whereby these hearings were conducted in person, unless leave was granted to appear by phone.

Again, this represents cost savings for clients.

Final hearings

Overall, Microsoft Teams software has worked well and has allowed for judges, practitioners and clients based in different locations, including interstate or overseas, to participate. However, in a post-COVID context, members expressed a preference for final defended hearings to proceed in person, except in matters involving serious allegations of family violence. Some members have found trials conducted via Microsoft Teams to be difficult, particularly in relation to the ability to properly and effectively cross-examine witnesses. In matters where one party is a defaulter, personal appearance may assist in encouraging compliance. Self-represented parties may also have more difficulty navigating a hearing by Microsoft Teams or telephone. In these circumstances, the party should appear in person and should have the benefit of assistance from a duty solicitor.

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QLS supports ongoing use of technology-facilitated hearings in some circumstances. As noted above, this includes matters involving serious allegations of family violence. It would be useful for expert witnesses to continue to be granted leave to provide evidence by video, instead of by telephone or in person. This would also reduce costs for parties.

Federal Circuit Court Registrar Mediations

Members generally expressed a preference to attend mediations conducted by Registrars in person. Communication is generally easier in person, allowing for negotiations to be more effective.

However, for matters involving allegations of domestic and family violence, mediation may be more effective in circumstances where parties do not feel fearful or intimidated. It may also be appropriate for mediations to take place electronically in matters where parties and their representatives would be required to travel a considerable distance to attend in person. This would also reduce costs to clients.

QLS would support ongoing use of technology-facilitated mediations in these matters.

Electronic signing of documents

The ability to have documents signed electronically, rather than in person, has been a significant improvement. Members have found that this is a considerably more efficient way to have documents witnessed, and has had associated cost benefits for clients. This process overcomes any inconvenience and delays associated with coordinating multiple witnesses in a range of different locations.

Subpoenas

The process of inspecting subpoenas should have been modified in response to the COVID pandemic to allow electronic copies to be provided automatically, with the exclusion of some sensitive material such as medical records, rather than requiring parties to attend in person to inspect subpoenaed documents. QLS would support some limitations around this, for example, that copies be provided to legal representatives only. The provision of electronic copies in some circumstances would be a cost effective and efficient as a post-COVID measure.

Where leave to copy is not granted, some consideration should be given to allowing documents to be inspected electronically, for example via the portal, but not copied or downloaded. A record of who has accessed the document may provide additional protection.

In the Federal Circuit Court, the ability to e-file subpoenas, electronically serve subpoenas on the Queensland Police Service and Department of Child Safety and the ability in some instances to obtain electronic access to subpoena documents has been welcomed by practitioners.

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Infrastructure and technology


Members have experienced a range of infrastructure and technological difficulties in engaging with the Courts over the past few months. QLS accepts that during this period of rapid and unexpected change, these difficulties are inevitable and may take some time to resolve. For appearances via Zoom or Microsoft Teams, members have experienced delays with internet connections, audio, difficulty in objecting to questions quickly and difficulty ensuring the Court and witnesses had access to necessary court documents.

In relation to Federal Circuit Court conference calls, members expressed a preference for receiving a conference call link, rather than the associate individually calling each party. This is because if one party drops out, the associate would need to ask all parties to hang up and the call would be attempted again.

Our members have reported some judges refusing to permit solicitors and barristers to mute the telephone to obtain instructions. In our view, this should always be permitted. Court staff should also email instructing solicitors when a matter is "called" again, in addition to notifying counsel. Otherwise, instructing solicitors and relevant third parties will not know when to call in if located separately.

QLS would welcome the opportunity to work with the Courts in the ongoing development of and changes to court processes in response to the COVID pandemic. If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Elizabeth Shearer
Deputy President